CYCLOPEDIA OF LAW

HOW TO STUDY LAW

CONTAINING

PRACTICAL SUGGESTIONS TO STUDENTS, BUSINESS MEN, WOMEN AND ALL OTHERS WHO DESIRE A KNOWLEDGE OF THE ELEMENTARY PRINCIPLES OF LAW, INCLUDING A CLEAR PRESENTATION OF THE ELEMENTS OF

BLACKSTONE'S COMMENTARIES

VOLUME I

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ASSISTED BY
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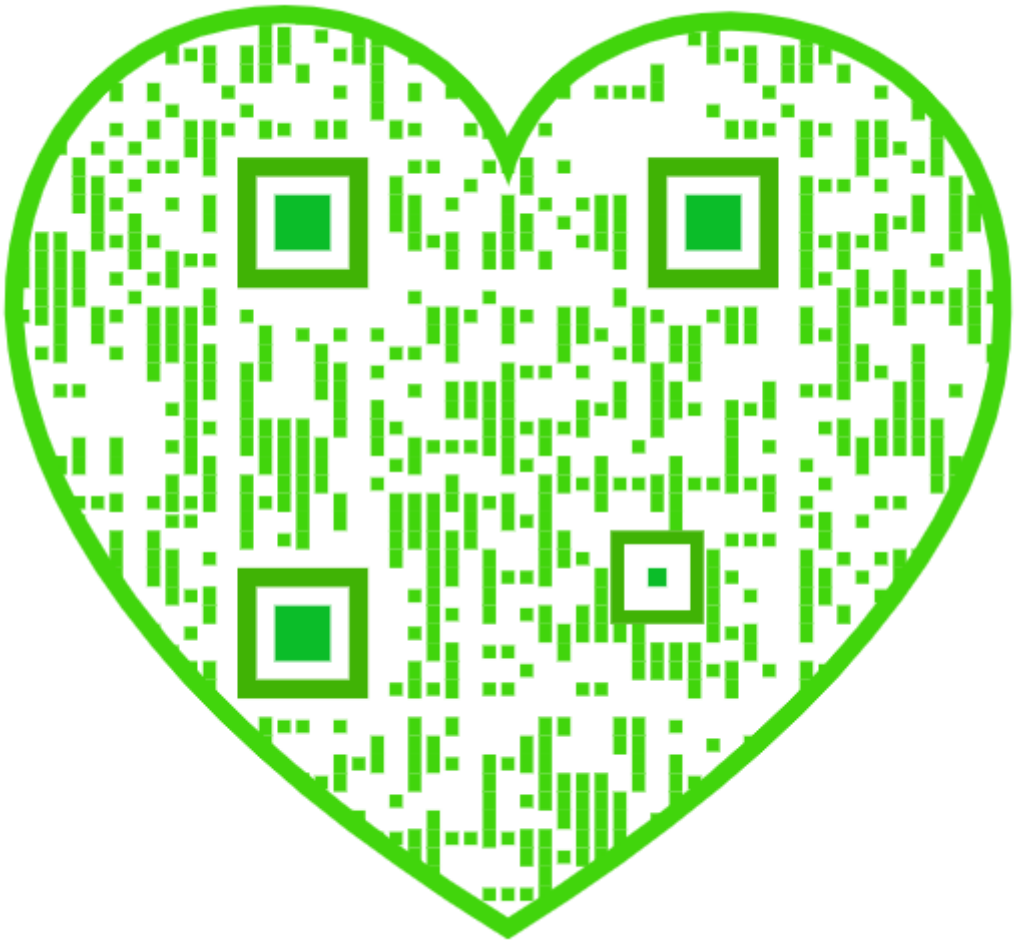

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PUBLISHERS' PREFACE.

During the past century it has been evident that some shorter law course must be produced, in order that law students could get away from the long and tedious work of reading the entire contents of ancient law books.

The American Correspondence School of Law recognizing this fact, has met all the requirements of the law student, whether he studies for the purpose of adopting law as a profession, or studies as an aid to his business.

The Cyclopedia of Law, written by the Hon. Charles E. Chadman, LL. B., LL. M., LL. D., and assisted by a corps of legal experts, is not alone a work for students and beginners, but an authority, a text set, an encyclopedia of reference which is spoken of in the highest manner by judges and practicing lawyers, and which they advocate as a part of every lawyer's and every business man's library.

It has the endorsement of professional and business men in all classes of life. It is published in a form that is a guide to the student and the books following one another, place within his possession an easy and systematic way to learn the law.

As a matter of economy, it saves both time and money. The student saves the expense of attending a law school,

of travel, of extra books, and he obtains his legal education at odd hours and absolutely without interfering with his other business.

When books of instruction are contemplated, the first question to be decided by the publishers, is, whether or not there is a need and a demand for such books, and, second, will the book supply the demand by giving the public, or the technical student, the information he desires. The Cyclopedia of Law is placed in the possession of student lawyers and others who wish a knowledge of law, because such a work is needed and has been for a long time. It combines and contains so much that the student must know, that as a guide, it is indispensable.

The entire work is written in a manner which makes it easy to understand by those of common school education and the reader will find an absence of technical and confusing legal terms and especially of Latin which has confounded and discouraged so many beginners.

We therefore place the Cyclopedia of Law before the public, knowing it supplies every need to those who desire to know the law and that it fills a want not heretofore supplied.

AUTHOR'S PREFACE.

The study of law is a question of importance to an ever increasing number of persons who desire a practical and inexpensive method of fitting themselves for the legal profession. The same question is also suggesting itself to persons who are, or expect to be, established in other callings, who wish to understand their privileges and responsibilities under the law, and the legal ties that regulate their varied business and social relations. The Cyclopedia of Law seeks to answer this question in a manner at once practical and satisfactory to students in every sphere and condition of life. The work, it is hoped, will aid the law office student and the law school student, as well as that great class of persons who are unable to have the advantages of either school or office instruction.

The time has arrived in America in which a person who wishes to succeed must be able to think as well as act. The law offers a large and expanding field for the development of character and personality, and a knowledge of it is as beneficial from the standpoint of a liberal education as from that of a life calling.

Blackstone claimed for his lectures that they were "as a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities" and that it was not his busi-

ness "to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet." He believed that the student's attention should be engaged "in tracing out the originals and as it were the elements of the law," and cited Justinian to the effect that if "the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies or will carry him heavily through them, with much labor, delay and despondence." Intro. Bl. Com., p. 36.

The Cyclopedia of Law aims to perform the same office for the American student as the Commentaries did for the English student of law. It will be the fixed and general principles of law and practice that will be dealt with; and these will be laid before the student in a plain and simplified manner. The minute provisions of statutory law will be indicated and the students prepared for their interpretation and application. The same author quoted above has said that a plan of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions, and that an attention not greater than is usually bestowed in mastering the rudiments of other sciences, or in pursuing a favorite recreation or exercise, will be sufficient to encompass in this manner the principles and grounds of the law.

Law is the garnered wisdom of ages of political development and the true conservator of civilization. It nominates the duties of the citizen and sanctifies the

rights of the individual. These rights and duties must be known and fulfilled if our nation is to exist for any extended period and answer the high purposes for which it was established.

In connection with the text-books of the principles of law, we present the important decisions from which the principles were derived, or in which they were made of practical application in the solution of legal controversies.

The value of the study of leading cases along with the principles of law is now generally admitted by the foremost educators, and the combination is in use in all of the best schools of the land.

In the preparation of these cases a proper regard for brevity and space has been sought. Almost every decided case has a number of facts and details which are in no wise material to the point or points decided, and which the case best illustrates. Hence, we have taken the liberty to drop out what was deemed unnecessary, and in many instances, been compelled to leave out reasoning which, but for the limited space to be used, we would have been glad to give at length. The little periods to be found throughout the cases sometimes mean the elimination of but a few lines, and again the omission of several pages.

The judge, the lawyer, the student and the citizen will all appreciate how loath one must be to curtail to any extent, however limited, the clear cut, concise and logical decisions by Marshall, Chase, and others. But when it is recalled that the Northern Securities Case,

and the Insular Tariff Cases, cited by us, if given at length, would alone make a book twice the size of any one of the volumes, the necessity of abridgment will be easily apparent.

The educative value of these decisions is almost unlimited. They reach down, as it were, into the moving cogs of the machinery that ground out our early history, and set to rights the delicate and intricate combinations that served to make that magnificent civilizing power—the government of the United States. Though some of the great business concerns may chafe at the regulations which the law, in its onward course, may deem necessary to control their giant operations, that civil and industrial liberty may not be crowded out of the land, yet there is not one of them that could exist for a single day without calling into use the protecting and shielding principles which the courts of law have established to safeguard both natural and artificial persons.

Just as the decisions of the Supreme Court of the United States guided and controlled the development and operation of the federal and state governments under the Constitution, the great decisions of the courts of final jurisdiction have moulded and governed the mechanism of commerce and industry throughout the civilized world. The student or citizen who has these acknowledged land-marks of the law spread out before him has, as it were, a detailed and perfect map or panorama of the history of civilization—a key to the solution of all problems, governmental, social, industrial.

While a study of these cases may well engross and

assist the most advanced student or professional mind, it is that large class of self-reliant, strenuous and democratic spirits who, from the fields, farms and workshops are pushing forward by their own sheer merit into positions of trust and confidence, and taking the helm in affairs political, social and industrial, that are chiefly to be benefited.

We trust that the method herein presented of encouraging a knowledge of the laws and institutions of our advanced civilization will meet with the approval of the general public, and be a help and a benefit to those who desire this knowledge.

CONTENTS.

CHAPTER I.

GENERAL SUGGESTIONS.

The Chief Difficulty of the Student..... 1
Same Subject—This Difficulty Avoided..... 2
How the Law was Studied Prior to 1765..... 3
How Law was Studied Since Blackstone's Time..... 4
Advantages of the Cyclopedia of Law..... 5
The Necessity of Legal Knowledge..... 6
What Previous Education the Law Student should have... 10
The Time Required to Learn Law..... 16
Should all the Student's Time be Devoted to Study?..... 19
The Cost of a Legal Education..... 24
At what Age should the Student Take up Law?..... 27
Women should Study Law..... 28
To Those who may Desire to use the Cyclopedia of Law.. 30
Same Subject—Teachers and College Students..... 32
Clubs of Students..... 33

CHAPTER II.

DEFINITIONS AND DIVISIONS.

The Term Law Defined..... 35
Analysis of Blackstone's Definition of Law..... 35
Comprehensive Meaning of the Word Law..... 37
What Laws We are to Consider..... 42

Influence of the Law of Nature..... 43
Political Organization Precedes Law..... 44
Development of the Law..... 44
Political Organizations Described..... 46
Same Subject—A People Defined..... 46
Same Subject—A State Defined..... 47
Origin of States..... 47
Kinds of Governments..... 49
Same Subject—Republican Government..... 50
What is the best Form of Government?..... 51
Sources of the Law..... 53
Legislation, or Law-Making..... 58
Written Laws 58
The Unwritten Law..... 59
The Common Law..... 59
Equity or Chancery Law..... 61
Depositories of the Law..... 61
Codification of Laws..... 62
Divisions or Branches of the Law..... 65
Public International Law..... 65
Private International Law..... 65
Constitutional Law 66
Law Pertaining to Persons..... 66
Law Pertaining to Property..... 67
Law Pertaining to Crimes..... 67
The Law of Procedure..... 68
Legal Ethics 68
The Interpretation of Laws..... 68
Law and Popular Influence..... 70
Influence of the American Lawyer..... 71
Subjects Treated in the Cyclopedia of Law..... 73
Helps to Students..... 74

PART II.

SELECTED CHAPTERS FROM BLACKSTONE'S COMMENTARIES.

Author's Introduction to the Study of Blackstone..... 79
Nature of Laws—Section II—Of the Nature of Laws in General 85
Section III—Of the Laws of England (From Blackstone's Commentaries) 119
Book the First—Of the Rights of Persons Chapter I (From Blackstone's Commentaries)..... 161
Chapter X—Of the People, Whether Aliens, Denizens or Natives (From Blackstone's Commentaries)..... 194
Chapter XII—Of the Civil State..... 210

BOOK THE SECOND.

(From Blackstone's Commentaries.)

OF THE RIGHTS OF THINGS.

Chapter I—Of Property in General..... 227
Chapter II—Of Real Property; and, first, of Corporeal Hereditaments 247
Chapter III—Of Incorporeal Hereditaments..... 251
Chapter V—Of the Ancient English Tenures..... 272
Chapter VI—Of the Modern English Tenures..... 299
Chapter VII—Of Freehold Estates of Inheritance..... 334
Chapter VIII—Of Freeholds, Not of Inheritance..... 358
Chapter IX—Of Estates Less than Freehold..... 386
Chapter X—Of Estates upon Condition..... 402
Chapter XI—Of Estates in Possession, Remainder and Reversion 418

Chapter XII—Of Estates in Severalty, Joint-Tenancy, Coparcenary, and Common..... 441
Chapter XIII—Of the Title to Things Real, in General.. 464

OF PRIVATE WRONGS.

Part III—Of the Redress of Private Wrongs by Mere Act of Parties (From Blackstone's Commentaries)..... 471
Chapter II—Of Redress by the Mere Operation of Law.. 495
Chapter III—Of Courts in General..... 500
Chapter IV—Of the Public Courts of Common Law and Equity 511
Questions for Students..... 561
Abbreviations 585

HOW TO STUDY LAW.

CHAPTER I.

GENERAL SUGGESTIONS.

Section 1. THE CHIEF DIFFICULTY OF THE STUDENT.—Aside from the general difficulties of time, money, and previous educational advantages, the student, young or old, in the office or in the law school who is earnestly in quest of legal knowledge, finds his enthusiasm checked and his ardor cooled by discovering that there is no key to the varied stores of legal lore which exist, and which he is only too eager to make his own. To one who has traversed the rough road heretofore followed by every student of the law, it is palpably apparent that much valuable time is lost, and the keen edge of the student's appetite for the science unnecessarily blunted because he is left to delve too deeply, uncomprehendingly, in some branch of the law before he has taken a general and elementary view of the entire science.

The different branches of the law, like the divisions of other sciences, are correlated, and each branch assists the student in the comprehension of every other.

Sec. 2. THIS DIFFICULTY AVOIDED.—By the series of comprehensive and explanatory treatises contemplated by the Cyclopedia of Law, the student will be enabled to take up in succession the various branches of the science, master the fundamentals of each, and then be prepared for a more careful and exhaustive study of the history and spirit of the law as well as to reason concerning the natural foundations of justice. The divisions which are to be followed were suggested by the arrangement of subjects made by the examiners appointed by the Supreme Court of Ohio to conduct the examination of candidates seeking admission to the bar. The examination covered twenty branches and these in turn exhausted the field of American law. It is the aim of the author of this series to present one or more of these branches in each number of the Cyclopedia of Law. This set of books will enable any person to study law with satisfaction and profit, and not only to become familiar with the rights and duties of an American citizen, but also, if desired, to pass the hardest possible bar examination and embark with credit and adequate preparation in the legal profession.

A general summary of the principles of law as they stand to-day is sought to be spread out before the student in an interesting way, not too learnedly, not too carelessly, for the lawyer must never be careless, and in the study of the law we cannot discard a certain degree of technicality. We take no credit to ourselves in recognizing the need of the student in this regard;

one would not set a child to learn music by giving him the inspirations of the great masters; these are the last stages in the acquirement of the art and must be preceded by careful but simplified teaching in the elements of music. So with law, its fundamental tenets must be grasped by the student before those more intricate problems will be clear to him; and if the basis of his legal education is sufficiently broad and firm there is no limit which he may not reach, and no problems which he may not solve. If we can but lessen the labors of the student at the outset, and give him such a view and grounding as will permit him from the inception to perceive the order and spirit of the law, and thus be inspired and not discouraged we shall be more than compensated for our undertaking.

Sec. 3. HOW THE LAW WAS STUDIED PRIOR TO 1765.—That the student may appreciate what the Cyclopedia of Law has undertaken to do for him we restate here Lord Chief Justice Reeve's direction to those about to begin the study of legal science. He said: "Read Wood's Institutes cursorily, and for an explanation of the same, Jacob's Law Dictionary. Next strike out what lights you can from Bohun's Institutio Legalis, and Jacob's Practising Attorney's Companion, and the like, helping yourself by indexes. Then read and consider Littleton's Tenures without notes, and abridge it. Then venture upon Coke's Commentaries. After reading it once, read it again, for it will require many readings. Abridge it; commonplace it; make it your own; apply to it all

the faculties of your mind. Then read Sergeant Hawkins to throw light upon Lord Coke. Then read Wood again to throw light on Sergeant Hawkins. And then read the Statutes at Large to throw light on Wood."

If these were the trials of the English student in the early days of the law, what shall we say as to those of the American student of to-day? The law—both common and statute law—has become infinitely more complex. The student is supposed to begin at the foundation not only of the English Common Law but in many cases to delve into the half-forgotten lore of the Civil or Roman law. Thousands of text-writers now compete for the mastery in stating with voluminous detail the ever expanding subtilities of the law; volumes have been written upon subjects as copyright, patents, commercial law, etc., mentioned in a few lines by Blackstone, if, indeed, they were reached at all by that exhaustive commentator; the diverse statutes and precedents in the different States add to the beginner's confusion, while the extreme particularity and detail with which every personal and property right of the individual is guarded by statute makes the task of the law student seem well-nigh endless.

Sec. 4. HOW LAW HAS BEEN STUDIED SINCE BLACKSTONE'S TIME. — Blackstone's Commentaries on the Laws of England were first published in 1765, and since that time almost every student of the law has made extensive use of this valuable work from the inception of his studies. While this famous work is now largely of historical value only, it is still

the beginner's fate to be asked to partake of it in large doses. Prof. Walker has stated the true reason, we believe, for the continued popularity of Blackstone. He says: "There is no work on American law at all suitable for a first book; and we are compelled, for want of such a work, to commence with Blackstone's Commentaries on English Law, to learn the rudiments of American law." Walk. Am. Law. 4.

We now have, it is true, Walker's work, and Kent's Commentaries, which are valuable to the American student and much more practical than Blackstone, yet these, too, have been largely outgrown by the rapid changes in the American legal systems. And our most successful law schools make use of them simply as reference books, and acquaint their students with the history of the common law by means of abridged oral lessons upon the leading subjects. The student is then occupied with principles, leading cases, and statutes, with some attention to details of practical procedure. The student who undertakes to master the science without any assistance from those who have already gone over the ground has a difficult task, and one which he will never accomplish without a world of pluck and perseverance.

Sec. 5. ADVANTAGES OF THE CYCLOPEDIA OF LAW.— The important assistance which the law student needs is, first, to be enabled to read the fundamentals of the science understandingly; second, to have furnished to him or designated what he should read; and, third, to have such reading collected into

reasonable compass. All this is done by the Cyclopedia of Law.

First. The student is enabled to read law understandingly by this system, since the whole aim and scope of the school is directed to instruct the novice and gradually and systematically add to his present knowledge an accurate legal education. Most text-books upon legal subjects are for the benefit of trained men—professionals—and hence little care is taken to simplify the rules laid down. This school is for beginners, for students just setting out upon an unknown road, and every precaution will be taken to make each step clear and smooth.

Second. The school furnishes in the first instance just what is to be read, and then designates, by way of supplemental readings, such other and further sources of knowledge as will be most convenient and beneficial to the student.

Third. This information is collected into the briefest possible form, with all unnecessary and antiquated details lopped off, though the references are sufficiently varied as to permit the student with a great amount of leisure to investigate in detail any important or special subject.

Sec. 6. THE NECESSITY OF LEGAL KNOWLEDGE.—To speak of the necessity of some knowledge of the law to one who intends making the law his profession is doubtless unnecessary. Yet we occasionally hear of persons in those States where a good moral character is sufficient to gain admission to

the bar, who are absolutely deficient in the very rudiments of the profession which they are legally entitled to follow. The results of admitting incompetent persons to practice are, a lowering of the standard of the profession, and a jeopardizing of the interests of the client often amounting to a denial of right.

To the average student intending to become a lawyer, we need say no more in regard to the necessity of his understanding the science or profession he wishes to make his life's calling. But there is a pressing necessity for every man and every woman to understand at least the rudiments of the law. By a rule of law, as ancient as the law itself, every one is conclusively presumed to know the rights and duties which it confers or compels. That this is a violent presumption no one will question, for we believe there is none that has ever been made that varies so generally from the truth. Still the rule remains, and in general all sane adults, ignorant or wise, are responsible civilly or criminally for any and all transgressions of the fixed rules of the State or nation which we call laws. They are likewise dependent upon these rules for the enforcement of their rights, and if they know not their rights under the law how can they enforce them? Laws, too, are not always in conformity to what natural reason would lead one to infer the law ought to be, and so there may easily be an honest infringement of the strict letter of the law, which will, nevertheless, subject the offender to the prescribed penalty. The law, as we shall see, in providing what is right, and forbidding what is wrong, acts arbitrarily,

and recognizes no absolute rule save the intent and will of the lawmakers.

It is apparent that every man, high and low, should have some general knowledge of the laws under which he lives. Without such knowledge he is in continual dread of some coercive and irresistible power, which he may ignorantly offend at any moment; or his dearest rights may be infringed upon by others and though redress be within reach he does not know that there is redress for him. Surely, these reasons would suffice to encourage every person to familiarize himself with the general principles of the laws to which he is subject.

But there are other and higher motives which should induce each citizen to acquaint himself with the laws of our land—a land, "perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution." Ours is a popular government. Each man in casting a vote is, in respect to that vote, a law-maker. To cast his vote judiciously he should have some knowledge of what law is, and the ends it is expected to conserve. In England, the filii nobilium—sons of noblemen—were instructed in the laws that they might protect and guard their estates and privileges. In America, by grace of God, all men are filii nobilium, and if they would retain this priceless heritage bestowed by the fathers they must acquire a knowledge of, and a love for "those equitable rules of action by which the meanest individual is protected from the insults and oppression of the greatest."

Sec. 7. BENEFITS OF LEGAL EDUCATION.—"I think it an undeniable position," said Blackstone, in the introduction to his series of law lectures, "that a competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar; a highly useful—I had almost said essential—part of liberal and polite education." But the average American of to-day desires further benefits, and is prone to ask after the practical advantages of legal study, and in this case he can be fully satisfied, since in no branch of education are the benefits so varied and extensive as in that of the law.

From birth until death the interests, not to say destiny, of each individual is indissolubly connected with the law of the land; every incident of his career, every personal and property right, every domestic, social, and business relation is regulated or defined by it. It may not be possible or practicable for every man to be his own lawyer, but it is possible and important for a freeman to be familiar with the rudiments of the science which guards his liberties, and to be cognizant of the general principles which govern his every day business affairs. This information should be taught in the public schools, and is, in our opinion, far more important than some of the things which are taught there at present.

It is astonishing that in a progressive age, and in a land literally dotted with free schools, the great mass of citizens should be utterly unacquainted with the laws regulating contracts, the acquiring and disposing of real and personal property, and the fiduciary relations; or

with commercial usages and the statutory provisions governing the civil and criminal liability of individuals. We believe that the time has come to dispel the ignorance of the masses in regard to the laws of the land, and for a general study of that science "which distinguishes the criterions of right and wrong; which teaches to establish the one and prevent, punish, or redress the other; which employs in its theories the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community."

Sec. 8. WHAT PREVIOUS EDUCATION THE LAW STUDENT SHOULD HAVE.—Every particle of education one can possess along any and all lines will be of help in the study of the law. Even technical or professional training in the allied sciences would be advantageous, so no student of the law need fear that he may know too much. But the important question is, how much should the student know? Shall we look to the past method of legal education, or to the law schools of to-day to determine this question? In either event we shall find a great variety of answers. In the multitudinous examples of eminent lawyers we might cite, some were fully and carefully trained in the highest seats of learning, while others were without any of the advantages of the so-called higher education. Among the law schools and universities of to-day we find various standards; some requiring a collegiate education, including an extended course in

the dead languages and a term of years spent in perusing the theories and sophisms of the latest expounder of "isms" and "ologies," and others that leave their doors open to all who have a fair understanding of the English language and the ordinary branches taught in the common schools. In the universities and colleges the tendency is to raise the standard, and within the past few years the standard in some schools has risen from the lowest to the highest requirements. It is not our purpose to decry this raising of the standard of admission to law schools, though we may be pardoned for sympathizing with and repeating the conclusion of another writer who has canvassed these two methods of dealing with prospective students: "One shows the selfish side of learning, and the other the more liberal and praiseworthy. The former would deny entrance to the ranks of the profession to the ambitious poor man, while the latter would open the doors wide enough to take in any one who has ambition and energy enough to pursue the study."

Should the schools carry their advance standard to the extent of asking that these requirements be made part of the qualifications necessary for the admission to the bar, we should most seriously object. The ancient languages, and the varied store of ornamental education which go to make up university training should not be forced upon every youth who desires to set up as an expounder and practitioner of the plain and exact rules of justice and rights which make up our legal system. In America, we have had, and I trust may ever have,

two sorts of lawyers and judges, equally capable, honest, and beneficial. One sort came from the colleges, the other from the farms and workshops direct; one skilled in all the flowery phrases of antiquity, and overflowing with historical disquisitions upon legal theories; the other with the metal of their brain and heart robust and free and prepared to ring out loud and clear when struck by the unanswerable logic of progress, or wrung by the pleadings of oppressed humanity. "Men have worn the judicial gown who have never seen the inside of a Latin grammar, and they were none the less able judges, despite the fact." Andrew Jackson and Daniel Webster were equally necessary to mold and develop our civilization, though the former was but the rough, untutored frontiersman and the other the college-bred student. At the bar they were equally serviceable; and in the gravest affairs of state who shall say that the honest determination and direct Americanism of the staunch "Old Hickory" was not as much needed as the careful and profound declamations of Webster? Abraham Lincoln and William H. Seward again illustrate the two types of American lawyers. The former was home-made, his ideas of right and wrong were God-given and unbiased by the subtle theories of the past of human institutions; the latter was coached and crammed in the institutions of learning and was disposed to look askance at his more humble brother from the plains. Both were led to espouse the cause of the enslaved negro, and to do their utmost to vindicate his right to liberty and equality under the law. We are

permitted to judge whose influence was the greatest, whose words were the most potent to bring about a general recognition of a principle which is now fundamental. When we have decided whether the sublime yet unostentatious words of Lincoln or the pompous declamations of Seward were the most efficacious; and whether the uncouth but true-hearted executive, or his cultured and self-important secretary were most serviceable to the nation in its darkest hour, we shall have decided the controversy between the college-trained and the home-trained lawyer.

One of the prerequisite attainments of the student of law suggested by Blackstone is, that he be able to reason with precision, and separate argument from fallacy, by the clear, simple rules of pure unsophisticated logic; to fix his attention, and to steadily pursue truth through the most intricate deductions by plain mathematical demonstrations. This, we think, touches the keynote of the student's qualifications to begin the study of the law. There is no absolute need of his having a collegiate education; a fair grounding in the ordinary common school branches, supplemented by home readings on the History of the English and American people and the development of our social and political institutions will enable him to pursue the study of the law with the highest credit and advantage.

The languages, as Latin, Greek, French, would not assist the student as much as many suppose. True, the language of the law was at one time a compound and barbarous jargon; from the conquest of England in

1066 until 1363, legal proceedings were conducted in Norman French. In 1363 the statutes required the proceedings to be conducted in English and enrolled in Latin, and this was the general rule until 1730, when an act of Parliament required the records to be made in English. (Walker's Am. Law, 2.)

Some of the terms used in these early proceedings at law have remained, and have come to possess a definite technical meaning, but the student learns the meaning of these terms as he does the principles of the law, and thus comes to use them as clearly and correctly as though familiar with the language of which they formed a part. While a number of these technical law terms must be mastered, they are not favored in modern practice and many of them are becoming obsolete, and where suitable modern terms can be used they are to be preferred. Thus a fair knowledge of the English language is all that the student need have, and in the course of his study the terms derived from the older languages, as "bailment," "trover," "tort," etc., will become as familiar to him as the technical expressions, "hearsay," "rule in Shelley's case," etc., which are used by the profession. Our position is, that these terms must be analyzed and learned by the student; no one can comprehend them spontaneously, since they have come to have a set, technical application which cannot be varied and which no other expression will convey.

A laughable incident is reported about a student who relied on his general information to answer the question: "What is the rule of law in Shelley's case?" his answer

was: "The rule in Mr. Shelley's case is the same as in any other man's case; the law being no respecter of persons." Another student taking the bar examination in Ohio in March, 1897, answered the question, "What is hearsay? Give five exceptions to the general rule in regard to hearsay," as follows: "It is natural for a man to here all he can if he has good hearing; this is a natural instinkt for humanity, and there is no exceptions." Students who make such answers are generally set down as being incapable of learning law at all, yet we believe their chief difficulty lay in not having access to comprehensive treatises upon the subjects constituting the examination. Important branches of the law may be thoroughly mastered by the office student, and he may be ever so capable, and yet likely to make mistakes upon subjects not covered by his readings. But in the latter case the composition and spelling indicate such a lack of the fundamentals of education, as, if not corrected, will prove a bar to success in any calling.

We would advise the student, if such there be, who cannot master the common branches, as spelling, reading, writing, grammar, etc., not to take up the law as a profession, merely because he has a gift of "gab." This latter qualification is coming to be less and less in demand. And while we may deprecate the spirit of the times that does not make orators, we can but commend the quiet and orderly bearing of most counselors in the conduct of a case. No bellowing, no contortions, no dramatic poses; simply a natural and manly presentation of the client's cause, in the clearest and

most concise language the advocate can command. There may be some advocates who yet shed the "crocodile tear" in pleading for their client, but for every timid soul so won we believe the disgust of other honest and manly jurors is aroused by such practices of counsel who thereby brings defeat to the cause of his client. It may not be amiss to mention here a part of Judge Story's sage advice to young lawyers:

> "When'er you speak, remember every cause
> Stands not on eloquence, but stands on laws;
> * * * * * * * * * * * *
> "Loose declamation may deceive the crowd,
> And seem more striking as it grows more loud;
> But sober sense rejects it with disdain,
> As naught but empty noise, and weak as vain."

In conclusion, we would say that any American youth who really desires to follow the law as a profession, and all citizens anxious to become familiar with the principles affecting their person and property, need not hesitate to begin the study of law if they are able to read and retain thoughts and precepts, and to make deductions therefrom and to apply them to the questions that daily arise. With such qualifications any person can, by industry and application become proficient in the law. Our authority for this statement is the fact that thousands of eminent persons—attorneys and judges—began with no further qualifications.

Sec. 9. THE TIME REQUIRED TO LEARN LAW.—The time which the student will require to learn law will vary with the student and the method by

which he seeks to acquire his knowledge. That a long term of years entirely devoted to legal study is necessary we do not believe. Neither do we believe that any one, however great his genius, can master the legal science in a few weeks' or months' study. The method of study is important if the time is to be reduced to the smallest possible limit. A student may read for years among the law books and reports and not come to as full a knowledge of the law as by a single year's methodical study under a competent instructor or with the assistance of a condensed and capable series of guide lessons. Upon this subject another writer has said:

"In the first place, then, it may be stated that in no study is a capable guide more necessary than in the study of the law. It may as well be determined in the beginning that unless one can have capable direction in his study he may as well turn his attention to other fields of effort. The field of law is so broad, so compassed about by jungles of difficulties, almost interminable, even to the experienced student, so cut up by intersecting paths that confuse and tend to lead the student astray, so uninviting in some directions, which, though uninviting are important, that the student who proceeds to explore it without a chart or compass will find himself lost ere he is fairly started upon his journey. * * * The one matter of choice of books alone will present a difficulty that cannot be solved by the student without aid. It has been said that if a man should calculate on living to the age of sixty years, and should devote, with great industry, forty of these years

to the study of books, the most that he could accomplish in that time would be the perusal of about 1,600 octavo volumes of 500 pages each. One could live a life time, spending his entire time in the reading of the law and not read a single book twice. It is important, therefore, that the choice should be judicious, and after it is made, the whole should be studied with method."

The student who has the advantages of the Cyclopedia of Law, as well as students attending a college of law, are so aided and guided that the actual amount of time required to gain a thorough knowledge of the principles of law is not great. Some years ago the University of Michigan had what was called a one year course, for students who had some previous knowledge of the law, while the regular course of study embraced two years of nine months each. The course has now been enlarged to cover another year. As a matter of fact, there was little perceptible difference as regards attainment between the "one year" men, as they were called, and the full-course students. And we venture to say that the students finishing the course in two years made as good lawyers, and were as capable as the students now taking the three years' course will be. What does this statement signify? Not that the less time spent as a student of law the better will be the chances of success, but simply that student life is but the securing of the indexes to more thorough and advanced work, and should not be permitted to occupy too much of one's life. This idea is well stated by Blackstone, who quotes Sir John Fortescue as saying: "For, though

such knowledge as is necessary for a judge is hardly to be acquired by the lucubrations of twenty years, yet, with a genius of tolerable perspicacity, that knowledge which is fit for a person of birth or condition may be learned in a single year, without neglecting his other improvements."

Another eminent authority has said: "If one shall enter upon the study of the law under the impression that the extent of his advancement must necessarily bear some relation to the number of hours consumed in reading, and the number of pages devoured, and shall, in consequence of that mistaken impression, hurry over ground where he should proceed slowly, cautiously, and with much painstaking, he must be brought at last face to face with the fact that he is reading to little purpose, and catching but surface views. For it is as true with the mental as it is with the physical life, that, to nourish and strengthen the powers, there must be time and opportunity for digestion; and this process demands consideration, reflection, and patient and laborious thought. * * * The study of the law must be with active mind and receptive understanding." Cooley's Introd. to Bl., p. xi.

Sec. 10. SHOULD ALL THE STUDENT'S TIME BE DEVOTED TO STUDY?—The question whether the student should forsake all else, including manual labor and other mental work, to take up the study of the law is easily answered. The answer being that there is no necessity for so doing, and the results attained by the student will be the better if the

separation is not made. Blackstone says: "Sciences are of a social disposition, and flourish best in the neighborhood of each other; nor is there any branch of learning but may be helped and improved by assistance drawn from other arts." So it is plain that other studies may be pursued simultaneously with that of the law and be of increased benefit to the student. But thousands of persons desire to know if they can continue in their ordinary daily vocations and at the same time study law in the leisure hours their present calling allows them. We answer this query in the affirmative, and give as our reason for so doing the fact that thousands have already done so. Scores of teachers, stenographers, telegraph operators, commercial travelers, clerks of all descriptions, farmers, blacksmiths, artisans, etc., have studied law while holding their positions and have come to be creditable and capable attorneys. It must follow that any person, young or old, working for himself or for others, may, if he is energetic, find sufficient leisure time to read as much law each day as would be covered by an ordinary lecture in a law school. These homeopathic doses of law will prove entertaining as well as instructive, and if kept up for a period covering several years, as is contemplated by the Cyclopedia of Law, will familiarize one with the essentials of a legal education. We insert here some remarks by an attorney who favors this method of study. He says:

"I would have you emulate the example of persons whose time is methodically divided. Some men may not be able to give but thirty minutes a day to the study

of the law, and some may be able to give their entire time. The one who can give but thirty minutes need not be discouraged because he cannot give more. * * * It is not how much we read, nor how long we are in reading it, but how we read it. A student who has but thirty minutes is much more liable to accomplish what he undertakes in the way in which it should be done, digesting it small portions at a time, than is the man whose whole time is at his disposal, and who reads law as if it were necessary and possible to take it all in at one sitting. * * * One of the most frequent complaints I hear is: 'I have no time.' I have little patience with excuses of this character, since I know that in nine cases out of ten the excuse is one which is not based on facts. Time to pursue any line of study does not mean that one must of necessity devote several hours of each day to its pursuit. * * * A few moments each day, if given to the study at regular intervals, will be sufficient to accomplish wonders in the end, and the end need not be so very far distant. I have in mind a student who has but thirty minutes in the day that he can call his own, and that thirty minutes is the thirty minutes before breakfast. His plan is to read thoroughly and attentively during the thirty minutes, with pencil in hand, jotting down the main points as he passes over them. The memorandum thus made he carries with him through the day, and at odd intervals in his work refers to it, thus thinking it over and unconsciously digesting it. His work is of more benefit to him than were he to spend three or four hours each day

in cramming his head with a vast amount of reading, little of which he is able to retain, and much less of which can he understand or make part of his working knowledge." Thus is the question of time for the diligent person entirely removed.

But while we thus designate how the person employed in other work may study law, we do not wish to slight the fact that this putting to use hours of leisure is a task that only men of great personal control and indomitable energy can compass. Study, to many persons is a bugaboo only to be tolerated in the school-room. We all observe and credit the Franklins and Greeleys, but are slow to put in practice the rules of life which insured their ultimate greatness. Franklin's motto was: "Leisure is time for doing something useful," and the "something useful" was the development of his mind for the responsibilities of life. The student who, like Franklin, will separate himself from his companions and pursue steadily a course in law should have the additional credit of having mastered present selfish considerations for his ultimate good—a feat which only great and noble souls have ever undertaken.

Franklin's natural fondness for knowledge made him an insatiable reader. He devoured all the books he could borrow, and would often pass the greater part of the night in reading or study. By never wasting his time, he acquired a knowledge of the French language, the Italian and Spanish also, besides getting some acquaintance with Latin. He was thus fitted for the important position of plenipotentiary for the Court of

France, 1776, at the age of seventy-one. He became the most popular man in Paris and was overwhelmed with attentions from the learned, the nobility and the common people. He rendered, while in France, the most signal services to his beloved country. He was at once philosopher, statesman, diplomatist, scientific discoverer, inventor, philanthropist, moralist and wit. Franklin knew that real things could be accomplished through hard work, he never faltered and of him, history can and will say, *Amicus humani generis*—a friend of the human race.

Great deeds, great triumphs, great men, have their beginnings in small things—a resolve made, a habit formed, a temptation resisted, or a leisure hour well spent may have been the first cause—the igniting spark, of a fire which should glow undimmed until the end of time. Just as the little brook carves its way through the mountain which rises athwart its path and goes steadily onward, gathering volume and strength by the wayside, until at last as a mighty river it joins the ocean —the mother of waters—have the great lawyers, judges and statesmen—the Storys, Kents, Cooleys, Lincolns—by unrelaxed efforts covering many years, grown stronger day by day, until at last they loom up as the giant heroes of their profession and age. Reader and student, so may you ascend, not swiftly as on the eagle's wing, but slowly, surely, if it may be said of you, as of the other heroes—

"While others slept,
He toiled upward in the night."

Sec. 11. THE COST OF A LEGAL EDUCATION.—An important question to many persons wishing to study law is, How much will it cost? And we are sorry to say that many persons in the past have been deterred from attempting the study because of the large expense necessitated. The expense of a law school education ranges from $500 to $1,000, an amount that may well deter many persons who have to depend upon their own earnings, and who also may have upon them the care and support of others, from seeking the same. The method pursued by some of studying in a law office is less expensive, but also has numerous objections. The student may have the use of books, but very seldom has that definite direction and assistance which is so important to the beginner. Then, too, much valuable time of the student is required by the office duties, and his attention is frequently diverted, and his work liable to cover only those practical details of the ordinary practitioner's cases, instead of embracing the general principles of the science. The law office has, however, offered to many needy students an opportunity to enter a profession that otherwise would have been sealed to them. At present there are more persons applying than the law offices can accommodate. What shall be done with the surplus? And what can be done to aid the thousands of students in the offices who are in need of more careful direction and assistance than can be vouchsafed them by the busy office lawyer? The Cyclopedia of Law answers these questions. By its assistance the law school is duplicated in every home

of the land where a bright intellect desires to expand; it offers the advantages of a skilled instructor to every one; it places, at slight expense, in the hands of its students the best and most condensed legal literature, obviating the need of numerous and expensive books. All this the Cyclopedia of Law does at trivial, nominal cost to the student; the entire field of jurisprudence will be covered in the twelve volumes, and these can be secured by the student at a cost so slight as to be within the reach of all. Thus at the expense of a few dollars in money, and the employment of leisure moments for a period not longer than required to complete a law school course, a student may by this method come to a knowledge of the law.

Are you willing to embrace this opportunity? It may seem too practicable and easy to be real and genuine; or it may appear to you to be too prosaic a method to win fame and fortune at the home fireside by the careful, conscientious perusal of the matter furnished you by the Cyclopedia of Law. You may think that the historic halls of some famed institution are needed to inspire the muse which guides and directs your destiny; but remember, please, that others have preceded you and can testify to the efficacy of similar methods. A lawyer who has traversed the path the student must follow, says: "I have found that the best way to succeed is to do the best one can in the situation in which one finds one's self placed day by day, without looking further than is actually necessary. One day's work well done is sure to have its influence upon the

future, and no amount of complaining or fault-finding with present conditions or future prospects will bring a man an inch nearer to success. All that a man has is the past and present. If he has done the best that he could in the time that he has had to use, and is doing the best that he can in the present, the difficulties of the future will vanish as they are approached. Many of us think too much of the future and too little of the past and present. A man who has spent a year at employment which leaves him none the better off at the end of the year, so far as his knowledge and position in life are concerned, need find no fault if the future does not treat him well. It is a trite saying that every man is the architect of his own fortune. The man who starts in early to build and builds every day, will rear a more beautiful and more enduring structure than he who begins late to build, and who has injured his powers for good by neglect in the past. Much depends upon one's surroundings, much more depends upon one's self. The American youth has ever before him the examples of Abraham Lincoln, James A. Garfield, and hosts of other men who have been born amid circumstances and surroundings, in comparison with which no man can claim to occupy a less favorable position. No American boy can read the life of Abraham Lincoln without feeling that everything is possible in this country to a man who goes about seeking it in the right way." We know some will say that there were greater chances of success in former times; that the times have changed and the brilliant opportunities for individual success are all pass-

ed. Not so; Lincoln's opportunity was to assist in stamping out an injustice, other injustices remain, and will remain until there comes another great, true-hearted hero from the ranks of the people to awaken mankind to the new forms of oppression. Opportunities are never wanting, but sometimes the man is looked for long.

Sec. 12. AT WHAT AGE SHOULD THE STUDENT TAKE UP LAW?—Many persons ask, What is the proper age to begin the study of the law? In general we would say that a person is never too old or too young to study law if they have the requirements heretofore mentioned of a mind capable of retaining the thoughts gleaned from the printed page. We know there is a prevailing impression in the world at large that when one has attained the age of majority he is a graduate from all schools of a primary sort, regardless of the preparation actually made for the struggles of life; and that after the age of thirty most persons consider it too late in life to think of changing the calling they have been following, however dissatisfied they may be with their condition. We take it that no extended argument is necessary to show the fallacy as well as danger of such conclusions. One's early advantages may have been such as to have precluded him from getting the most rudimentary education, yet his life should not be suffered to be dwarfed when a slight effort may remedy this defect. Men who were unable to take up the study of law at twenty or thirty should not hesitate to begin at forty or even fifty. It is never too late to add to

one's knowledge. Life is a school, and those who willingly prepare the varied lessons assigned will draw the prizes of position, wealth, happiness, which are freely offered to all, while those evading and skulking their duties in this school, must yet continue the course to the end, but without hope of securing any of the special prizes awarded to the meritorious.

As the requirements for admission to the bar quite generally demand that the person be of age, there is no special benefit for a student to begin the law too early in life. But on the other side there is no possible objection to persons, however old, taking up the study of law. The duties of citizenship and the responsibilities of being financial, executive, legislative, and judicial head of a family increase with one's years, and it is only right and proper that one's abilities should develop apace with these demands.

Sec. 13. WOMEN SHOULD STUDY LAW.—It has not been many years since women were practically excluded from the learned professions, and indeed, from all work not directly connected with the home. We have not space nor inclination to here argue the question of woman's proper sphere. Suffice it to say that woman has demanded and secured the right to train for and follow the professions. Most law schools now welcome women students, and a number of women lawyers have gained success at the bar. Aside from the question of following the law as a means of gaining a livelihood, which is no doubt an important one to many women in our day and age, is the equally important one

of a knowledge of the law as a branch of a liberal education. Women may now contract, enter into business, and control their separate property as fully and freely as men, and the same reasons which require the male citizen to have an adequate knowledge of the law apply with added force to women. We are pleased to note that a number of women have already grasped the situation and have entered the law schools to prepare themselves for the duties and responsibilities of managing their estates. Prominent among these women is the spirited and noble-minded Miss Helen Gould, now a student of Columbia Law School, whose inherited wealth is so great as to remove, we should think, all fears of having to make her livelihood by the practice of this or any other profession.

This is a practical age, and woman is a practical helpmeet. She wishes to do all she can in every possible sphere. Who will say her nay? The woman stenographer, the woman in business, and the wife of the lawyer have special reasons for possessing a knowledge of law. The stenographer, since she may at any time be called upon to draft legal papers, briefs, contracts, etc.; the woman in business, since she has all the responsibilities of a man and must be as wary and careful as he; and the lawyer's wife, since she should be able to appreciate her husband's triumphs in the "nice, sharp quillets of the law," and not be completely isolated from his intellectual existence.

Some women will ask, Will it be a difficult undertaking, this study of the law? We reply, Not more so

than many things woman has already attempted and accomplished. Not nearly so hard as numerous things which are set down as being within her sphere by men of the old school. We have known girls, of ordinary capacity and training, to take up the study of law along with a class of several hundred boys, and without apparent effort outstrip all but a few of their male competitors. The Cyclopedia of Law offers exceptional advantages to women students, as it permits the work to be done within the family circle, and does not necessitate breaking home ties, removing to a distance to take up a course of study where most of the students are men, as is the case in attending the ordinary law school. We believe that many women have been deterred from studying law because of the radically different circumstances in which they would be placed while pursuing their studies. In conclusion, we would say that we deem a knowledge of the law equally important to women as to other citizens of a free country, and that in the preceding paragraphs, while we have used the masculine gender only, we wish it understood that both men and women were intended.

Sec. 14. TO THOSE WHO MAY DESIRE TO USE THE CYCLOPEDIA OF LAW.— We realize that persons from various conditions and callings will ask themselves the question, Shall I take up the work of the Cyclopedia of Law? While we can only know generally as to your position we yet believe you can arrange to devote some time each day or week to the law if you really desire to study it. You

may be a farmer's son living on the farm. If so, you are honest, strong, hardy, ambitious, and are in possession of every attribute and requisite necessary for making a success of the law. All you need is the opportunity to study, and this the Cyclopedia of Law affords you. In the summer months your work is hard and covers long hours, and you will have little if any time to spare for study, but in the winter months you have a greater amount of leisure time than others, and can make up what you have neglected during the summer. Pure air, good health, and absence of the many things that serve to distract the attention of the city man, will materially aid you. Or you may be a clerk in a store, or an office, or a bank, and have considerable leisure time and only need the requisite mental determination to use it profitably. We advise you to begin the study of law and you will find that though it may appear as drudgery at first the time will soon come when you will take a delight in your self-appointed task. You may be employed as a traveling salesman, in which case you will have the choice of using your leisure time in one of two ways; first, in pursuing some helpful branch as the law, which may materially brighten your prospect of future success, or you can devote it to so-called pleasureable pursuits, which, far from benefiting you, will in time, destroy your capacity for doing any honest work. It is difficult for a person to profitably use time which is so cut up as that of the traveling salesman. The Cyclopedia of Law, however, is portable, and being of use in various ways, would be a valuable companion for

any salesman. Idle hours will be found when its presence will be a pleasure as well as a benefit. Try it.

Sec. 15. SAME SUBJECT—TEACHERS AND COLLEGE STUDENTS.—Another class of persons who can profitably and easily pursue the study of law in the Cyclopedia of Law are school teachers and persons attending college. Teachers, whether in the common, grammar, or high schools of the country, are ever desirous of becoming better prepared to fill their present positions, as well as fit to occupy the higher places to which they aspire. Innumerable persons of small means are using the position of teacher as a stepping stone to something higher. They aspire to enter a profession—the law, medicine, or ministry. Which shall it be? It is not our duty or privilege to decide for you. But should your decision be in favor of law, we can aid you in your pursuit of it. The Cyclopedia of Law will furnish just the aid that the teacher needs, and will come to his assistance at so slight a cost that his savings may be retained to furnish his office or to take a finishing year at some regular school. Again, if you are a teacher you may find it to your advantage to accept a higher position and accept teaching as your life calling. Will a knowledge of the law be of benefit to you in this case? Yes, it will be one of the best and most useful branches with which you could equip yourself. The reasons for our conclusion here have been so thoroughly presented in the preceding paragraphs that they need not be repeated. College students, not fitting themselves for any particular calling, can well use some

of their leisure hours in following the course in law as conducted in the Cyclopedia of Law. When they have finished their literary education they will also have a knowledge of a profession which can at once be put to practical use, and which in its acquirement will have assisted them in their other studies. Many college students now read Blackstone or Kent for the purpose of getting advanced standing in a law school when they are ready to seek admittance. The Cyclopedia of Law aims not only to give them this instruction, but also the complete course as given by the law schools.

Sec. 16. CLUBS OF STUDENTS.—The chief advantages of the regular law schools are those resulting from isolation of the student from the every-day cares of life, and associating him with others who are pursuing the same science, thus creating a special atmosphere, as it were, in which the student may imbibe law from the very air. "Moot Courts, Quiz Clubs, Recitations," these are advantages of the school away from home. Most of these advantages are afforded by the Cyclopedia of Law, and without some of the serious objections which can be raised to the so-called advantages of the other schools. We acknowledge the great benefits to be derived from association, but also have to admit that there are also some great evils that may result as well. Association may have an influence in other things than the study of the law, as is sometimes shown. The publishers of the Cyclopedia of Law desire that each student taking up the study of the law associate with himself others in his community desirous of similar

instruction and establish a Home Club of law students, whose habits, morals and ability are known and acceptable one to another. In this way all the advantages of the courts, recitations and clubs of the regular law school can be had without any of the dangers. While we advise the formation of these local clubs we wish it understood that they are not absolutely essential. It is the individual student that must do the most work, and this work no club nor association can do for him. No student can be educated by proxy, he must "grind," and grind alone, if he is to become the able and proficient adviser.

In concluding these suggestions, meager as they are, we cannot help but think that they will prove sufficient as an introduction to the Cyclopedia of Law, and the course of study contemplated by it. Americans are too keen-sighted to have to be carefully instructed how to secure their own best and highest welfare. We have left more unsaid than we have said, but we rest easy in the confidence that the bright minds that shall peruse these pages will be able to add many more convincing arguments why each should have a knowledge of the law which this series aims to furnish.

CHAPTER II.

DEFINITIONS AND DIVISIONS.

Sec. 17. THE TERM LAW DEFINED.—Law, as the term is used by the legal profession, and will be used in the Cyclopedia of Law, is defined to be, "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."

The above is Blackstone's celebrated definition of municipal law, the word "municipal" being used by him with reference to the laws of a state or nation, and to distinguish this meaning of the word law from that broader and indiscriminate use of the term in which it signifies a rule of action, whether animate or inanimate, and whether set by a human or superhuman authority. I. Bl. Com. 44.

A more concise definition of law, as the term is used by the courts and in the science of jurisprudence, is that given by Prof. Holland, who defines law to be " a general rule of external human action, enforced by a sovereign political authority." Holland's Jurisprudence, Chapter III.

Sec. 18. ANALYSIS OF BLACKSTONE'S DEFINITION OF LAW.—The definition of municipal law is thus analyzed and justified by its author:

1. Law is a "rule," as it is something permanent, uniform, and universal, and not a mere transient sudden order from a superior to or concerning a particular person. It is also a "rule" in the sense that it is an injunction and not advice or counsel, it must be followed at all events, willingly or unwillingly. The obligation is the result of a command and not of an agreement.

2. It is a rule "of civil conduct," since it refers only to the duties owing by the citizen to the political society in which he lives, and not to moral duties which are the obligations of natural or revealed law.

3. It is a rule "prescribed," that is, published and promulgated, and not a mere secret resolution of the legislator. It is requisite that every law be notified to the people who are to obey it. But the manner of the notification may be varied. Thus it may be notified by tradition and long practice, which supposes a previous publication, as in the case of the common law; by being read in public assemblages; and by being written or printed, as is now the general method. It is this requirement of notification which makes ex post facto, or laws having a retroactive effect, so decidedly unpopular, as in this case there could be no possibility of previous notice of the law. Hence all laws should be made to take effect only after their passage and publication.

4. It is prescribed "by the supreme power in a state" for the act of legislating, or prescribing the rule, is the greatest act of superiority that can be exercised by one being over another. "Sovereignty and legislature are indeed convertible terms; one cannot subsist without the

other." It is the very essence of a law that it be made by the supreme power.

5. It is a rule "commanding what is right and prohibiting what is wrong," for by the law are the boundaries of right and wrong established and ascertained. When the law forbids any action it becomes by reason of this inhibition wrong for the subject to do the thing forbidden, and if the law does not forbid the act, it is legally right to do that act, and this regardless of moral sanction.

In commanding the right and prohibiting the wrong every law may be said to consist of several parts, which are : (a) The declaratory part, by which the rights to be observed and the wrongs to be avoided are clearly stated; (b) the directory part, which orders the subject to observe the rights and abstain from the commission of the wrongs stated in the declaratory part; (c) the remedial part, in which a method is pointed out to enforce rights or redress wrongs; and (d) the sanction or vindicatory branch of the law, which designates the evil or penalty to be incurred by such as commit any public wrong, and neglect their duty. I. Bl. Com. 44-54.

Sec. 19. COMPREHENSIVE MEANING OF THE WORD LAW.—In its most comprehensive sense, the term law has been applied to designate the rules of external nature, and its meaning has been rendered ambiguous, because it is used indifferently to describe the order which pervades the universe, the observed regular phenomena of nature, the intangible moral restraints upon human conduct, as well as those definite

rules of human action prescribed by some political superior. But to the jurisprudent the term has come to have only this latter and limited sense, when used without a qualifying or explanatory word.

The older writers, as Blackstone, were prone to find a higher sanction for laws than that of their being prescribed by the sovereign political authority. They regarded man as a creature, and hence subject to the laws of his Creator. Man's free will being restrained and modified by the "immutable laws of human nature," and by his reason rendered capable of discovering the purport of those laws. Thus were the laws established by man for his social regulation, sought to be connected with the "eternal and immutable laws of good and evil, to which the Creator himself in all his dispensations conforms." Human reason, rightly exerted, discovers the laws which the Creator has set, as the principles, "that we should live honestly, should hurt nobody, and should render to every one his due," the fundamental precepts of the law laid down by Justinian. Again, according to these writers, the Creator in his infinite goodness has so regulated his creature, man, "that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action," and the rule of obedience is reduced to the one paternal precept, "that man should pursue his own true and substantial happiness." In addition to the laws discovered by reason, are those revealed directly by the Creator, and to be "found only in the Holy Scriptures."

"Upon these two foundations," says Blackstone, "the

law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." Thus, according to Blackstone, human laws, except in a number of indifferent points in which the divine and natural law leave man at his own liberty, are "only declaratory of, and act in subordination to, the former." And he concludes, "No human laws are of any validity, if contrary to this natural law, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original." This conclusion, as will be seen, is not in accord with his definition of municipal law, save on the supposition that all legislation is sanctioned by natural law.

Sec. 20. SAME SUBJECT—A LATER VIEW. —A later school of jurisprudents separate positive or municipal law entirely from the so-called natural or revealed law. Their reasoning is, that while man is a mystery to himself, external nature is a greater one, and he seeks to explain the more, by the less obscure. "As he governs his flocks and his family, so he supposes that unseen beings govern the waters and the winds. The greater the regularity in nature, the fewer such beings does he suppose to be at work in her; till at length he rises to the conception of one great being whose laws are obeyed by the whole universe, or having gotten the idea of the universe he holds that and not a supreme ruler and law-giver." Man believes himself acquainted either by experience or revelation with certain rules intended for his guidance, and hence the terms, laws of Nature, of

God, of beauty, of morality, etc., which he applies to observed relations and arrangements of external objects. So in the theoretical sciences; the term law denotes the abstract idea of the causes of phenomena; in the physical sciences law denotes the method of the phenomena of the universe; and in the practical sciences it signifies a rule of human action which is its usual and proper meaning. The practical sciences are divided into (1) Ethic, which is the science of conformity of human character to a type, and looks to duties binding on the conscience for which external legislation is impossible; and (2) Nomology, the science of the conformity of human actions to rules, which looks to the rights which are the elements of social life.

Another definition of Nomology is "the science of the totality of the laws for which external legislation is possible." Nomological sciences are divided into (1) those whose rules are enforced by an indeterminate authority, as so-called moral laws, laws of fashion, chivalry, etiquette, and all conventional laws, and (2) those whose rules are enforced by a determinate authority, as all statute laws, and other regulations of a political sovereign. It is these latter laws which are the sole concern of the jurist.

"The jurist is not obliged to decide as to the essential quality of virtue in itself, or whether it be conducive to utility, or is in accordance with nature; nor need he profess belief or disbelief, either in an innate moral sense or in a categorical imperative of the practical reason. The business of the jurist is, first, to accept as an un-

doubted fact the existence of moral principles in the world, differing in many particulars in different nations and at different epochs, but having certain broad resemblances; second, to observe the sort of sanction by which these principles are made effective." Holland's Jurisprudence, Chapters II. and III.

In this view of the subject it appears that instead of human laws being derived from and based upon divine or natural law, it was by the gradual expansion of municipal and positive law that man has come to his present high conception of moral and natural law. The question raised by these two views—Is, or is not, law an inborn conception, drawn by the process of reasoning from the immutable and eternal reservoir of divine justice?—cannot be settled here. There are two schools of thought on this question, and it is the student's privilege to choose his side. The question is not of such importance as to demand immediate solution. Whatever may be the true theory it still remains that municipal law is prescribed by the supreme power in a state, and its rules are enforced by the same power.

"Rights are and can be real, only as they are established in the civil and political organization. They are slowly and only with toil and endeavor enacted in laws and molded in institutions. It is only with care and steadiness and tenacity of purpose that those guaranties are forged which are the securance of freedom, and they are to be clinched and riveted to be strong for defense and against assault. The rhetoric which holds the loftier abstract conception avails nothing, until in the construc-

tive grasp and tentative skill of those who apprehend the conditions of positive rights, it is shaped and formed in the process of the state." E. Mulford, "The Nation," p. 83.

Sec. 21. WHAT LAWS WE ARE TO CONSIDER.—It is only the laws for the control of human action, set by a definite human authority, which must be a sovereign authority, that we are to consider. So that a law to the jurisprudent is a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is that which is paramount in a political society. Holland's Jurisprudence, Ch. IV.

Thus we exclude from consideration the principles or sentiments of right and justice which are termed laws of Nature, and which have been designated as "The unwritten and steadfast customs of the gods." "In their widest sense," says Prof. Holland, "the law of Nature includes animal instincts, regulating the care of the young and the union of sexes; in their narrower sense they are the Ius Gentium of the Romans, that is, a body of principles found in all nations which point to the similarity of needs and ideas of all peoples." It is evident that these indefinite and general ideas, deep-rooted as they are, cannot be termed laws in the same sense as those positive directions of the sovereign power of a state.

We also exclude from our consideration all those rules of indeterminate and indefinite authority, as moral rules, rules of fashion, etiquette, etc., which, though binding

in some instances, are not enforced by a determinate superior; and also those rules enforced by a determinate authority, if the authority is superhuman or politically subordinate. Hence we have left the field of positive or municipal law—being those general rules of external human action enforced by the sovereign political authority in a state.

Sec. 22. INFLUENCE OF THE LAW OF NATURE.—The influence of the so-called law of Nature is such that where the positive law has made no provision the natural ideas of justice, equity and good conscience are used to determine the question in dispute. Thus the law of nature is the scaffolding upon which Gentilus and Grotius built up the science of International Law, or the usages which regulate the intercourse of nations. And this law of nature or natural equity has been called in to help modify the rigor of the common law, and established what we now term Equity. Holland's Jur., Ch. III.

The law of nature, or the divine law, is also responsible for the division made by Blackstone of mala in se, and mala prohibita. Crimes and misdemeanors forbidden by the natural or divine law, as well as positive law, are termed mala in se (evils in themselves), while things not forbidden by divine law and yet proscribed by positive law are called mala prohibita (evils prohibited).

So far we have made use of the word "positive" or "municipal" to distinguish law as a rule of civil conduct from its more general uses; hereafter we shall drop

these words and use simply the term law, with the same meaning.

Sec. 23. POLITICAL ORGANIZATION PRECEDES LAW.—"Morality may precede, but law must follow, the organization of a political society." Holland's Jur., Ch. IV.

The student who has followed the foregoing reasoning, which separates law from the metaphysical rules to which it has been inaccurately applied, and sees that it is only to the decrees of a sovereign political authority that the term applies, will also see that there can be no law in this sense without previous political organization. There may have been principles of right more or less authoritative, but they are not laws until so declared by a law-making power.

Here again there is a division of opinion among jurisprudents, the German or Historical school, of which Savigny is a leading light, regards the political organization or state as the highest stage in the procreation of law, while the Austinian school, followed by Prof. Holland, regards the formation of the state as the incipiency of law.

Sec. 24. DEVELOPMENT OF THE LAW.—While the term law, always means an established rule, it does not follow that these rules are fixed and immutable. In fact one of the difficulties encountered in the study of the law, and one which arises from its very nature, is that the law is continually changing; adapting itself to the needs and situations of the people and things which it regulates. Thus, as we have heard Prof. Bigelow re-

mark, the continued relations of things will create a custom, and the custom will come to be enacted into a law and in turn regulate the relations which brought it into existence. But law only relates to binding rules. A thing which morally should be, and in time may be, is not a law until it is recognized and enforced. "Conscience might inform you what the moral law is, and what the municipal law ought to be; but it might greatly mislead you as to what the municipal law actually is." Walker's Am. Law. 5.

When the question arises what is the law in a matter, we cannot reason it out abstractly; we have to ascertain who has the law-making power in such a matter, and what that power has ordained in reference thereto. To determine this the lawyer must search the records of the statute law, or if a question of construction, the precedents, or authoritative decisions.

While law is thus arbitrary it is yet progressive and deserves those high encomiums which from the first have been lavished upon it by its most careful students. Edmund Burke called it "the pride of the human intellect, and the collected wisdom of ages; combining the principles of original justice with the boundless variety of human concerns." We have already seen Sec. 7, with what high favor Blackstone regards the science, while Professor Walker terms it "the grand regulator of human affairs." Without law there would be a constant chaos in human society, which is best described by the fearful name, anarchy. We believe all the encomiums conferred upon the law as a science are just and appro-

priate. The law is progressive; it loses nothing helpful; it seeks to retain nothing hurtful; it extends in an unbroken, expanding chain from the remotest antiquity to the present moment, governing the momentous affairs of nations and the trifling details of every-day life among individuals with equal exactitude and wisdom; it indicates as well as preserves the development of the past, and points out the path of our future progress.

Sec. 25. POLITICAL ORGANIZATIONS DESCRIBED.—We have seen that law results from the action of a political sovereignty or the supreme power in a state. How have these political organizations come to exist? From the earliest recorded history we learn that mankind was divided into groups or tribes possessing a common language, common customs and characteristics. We know that these groups expanded, developed, and colonized until they came to occupy a great extent of territory. That in some instances a group would establish a government within itself, and thus the political unit would be composed of a single people who would also be united by the ties of ancestry, language and customs. In other instances several groups would unite in the establishment of a common government, or by conquest one group would acquire the right to govern other groups, in which cases several tribes or peoples, differing greatly, might be subject to the same political authority.

Sec. 26. SAME SUBJECT — A PEOPLE DEFINED.—A people is defined to be a large number

of human beings united by a common language, and by similar customs and opinions, resulting usually from common ancestry, religion and historical circumstances. Holland's Jur., Ch. IV.

Sec. 27. SAME SUBJECT—A STATE DEFINED.—A state is the whole people of one body politic, and has been defined by the United States Supreme Court to be "a body of free persons, united together for the common benefit, to enjoy peaceably what is their own, and to do justice to others." Chisholm v. Georgia, 2 Dall. 456.

Prof. Woolsey's definition is, "A state is a community of persons living within certain limits of territory, under a permanent organization, which aims to secure the prevalence of justice by self-imposed law." Woolsey, Introd. to Inter. Law, Sec. 36.

A band of robbers or pirates, though inhabiting fixed territory and permanently organized, would not constitute a state within either of these definitions.

In the organic state there are two parts, one of which is sovereign and the other subject; the will of the majority, or of an ascertained class in a state, prevailing against any of their number who oppose it, constitutes the sovereign authority, while the persons subject to this power when exercised, including the majority, or the persons whose will constitute the sovereignty, are the subject part.

Sec. 28. ORIGIN OF STATES.—The Greeks supposed state to be of superhuman origin. From Grotius and Rousseau, writers of the seventeenth and eigh-

teenth centuries, came the idea of the Social Compact or Contract, by which people were regarded as having met and voluntarily formed their political organization. Hobbes, a writer of the seventeenth century, called a "City" one person, whose will, by the compact of many men, is to be received for the will of them all. Herbert Spencer finds the state to be a mere growth, the same as organisms have developed from lower to higher species. The formation of the United States into a Federal State was certainly by means of a compact agreed upon by the delegates of the people. Blackstone points out that "The only true and natural foundations of society are the wants and fears of individuals." And while he makes light of the Social Contract theory, by which men, actuated by a sense of their weaknesses, met and established governments for their protection, he accepts the family as the first political unit, and acknowledges it to have been held together by man's sense of weakness, and developed and expanded from the necessity of union. "And this," says Blackstone, "is what we mean by the original contract of society, which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied in the very act of associating together, namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual, and that in return for this protection each individual should submit to the laws of the community, without which sub-

mission of all it was impossible that protection could be certainly extended to any." I. Bl. Com. 47, 48.

Families, or groups of persons once formed for mutual benefit and protection, have at the same time constituted a political organization or government and nominated expressly or impliedly some supreme authority whose rules all are to obey. This supreme authority is necessary to all forms of government and is called sovereignty.

Sec. 29. KINDS OF GOVERNMENTS.—By Government is meant the system of polity or body of principles and rules by which the affairs of a state are conducted. Governments are almost as numerous in variety as there are states to have governments. The chief distinctions relate to the residence of the sovereign power, and in this regard the older writers have divided them into three divisions which are mentioned by Blackstone. These are:

First. A Monarchy, in which the sovereignty resides in a single person.

Second. An Aristocracy, where the sovereign power is lodged in the hands of a select body of persons or council.

Third. A Democracy, where the sovereignty is exercised in an aggregate assembly consisting of all the citizens of a community.

These three forms are said to cover all the other forms of government, which are either corruptions of or reducible to these. I. Bl. Com. 49.

Sec. 30. SAME SUBJECT—REPUBLICAN GOVERNMENT.—A Republic differs from each of the governments above described in theory, though it resembles an aristocracy in practice. A republic was defined by James Madison to be "A government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." The Federalist, No. 39. The sovereignty, in a republic, resides in the whole body of the citizens, and in this it resembles a democracy, but instead of being exercised by the people directly it is delegated to certain persons selected by the majority of the citizens entitled to vote.

A republic is sometimes called a constitutional democracy, in distinction from a pure democracy. The constitution directing the manner in which the people shall proceed to exercise their sovereignty. Calhoun's Works, I., 185.

A republican government, and especially our own, can lay claim to being a sort of a mixed government, and partaking of the best features of the other three. This is the sort of government extolled by Blackstone when he commends the English system of king, lords, and commons as being the best form of government. Our own republican government was modeled after that of England; we have the single executive, but elective instead of hereditary; the legislative power is intrusted to two houses, the one more numerous and nearer to the people than the other; and we have added the judicial

to balance the other two. Thus we have, as Blackstone claims for the English system, by a single executive, the strength and dispatch found in the most absolute monarchy; in the Senate we are supposed to have an assembly of persons selected for their wealth, influence, wisdom, etc., and constituting an eminently aristocratic body; while the lower house of Congress are "freely chosen by the people from among themselves," which makes it democratic in nature. I. Bl. Com. 50, 51.

Sec. 31. WHAT IS THE BEST FORM OF GOVERNMENT?—We should not, perhaps, at this time raise the question, What is the best form of government? We aim at present simply to give a brief outline of political history to enable the student to understand our own institutions and laws, which are to be taken up more fully under the subject, Constitutional Law, in the next number of Cyclopedia of Law. But the question is so important to us in America, as we claim to be making an experiment in government, that we will not pass the opportunity. Blackstone, who was called to expound the English laws, found in the course of his study that the limited monarchy of England was the best government. Many American writers, emulating Blackstone's example, have in writing of our laws claimed our government to be the best possible. We fully appreciate the merits of our American government. But as a student of the law we should regard all governments not as the best, but rather as progressive experiments, tending to approach the highest ideals of the members of the body politic. Our govern-

ment has many advantages over all that have preceded it, and our people have many political ideals unknown to the peoples of the past. These ideals of our people are constantly expanding and developing and it is the province of the "best government" to constantly approach and realize these political aspirations of mankind.

The best government should, like the bark that surrounds the growing tree, expand and grow as the tree grows, then it will not be cracked or burst asunder by the force which it seeks to enclose and regulate. A government which does not grow, and cannot be overthrown by the people, will dwarf and blast the races that have the misfortune to be subject thereto.

We are safe in saying that no existing government answers the definition given for either a Monarchy, an Aristocracy, or a Democracy. All are now mixed governments, each seeking to partake of the features best suited to its citizens. The English government, from which ours is largely derived, began as an absolute monarchy, but from its earliest dawn it had to combat the rising spirit of democracy. The spirit grew and monarchy yielded; in fact, the whole course of English history is marked by the concessions granted democracy. This change was slow; monarchy resisted, was overthrown, and re-established with more concessions. Growing democracy was transplanted to America, and soon blossomed and bore fruit. The fruit was the Declaration of Independence, and a government in which the people were recognized and declared to be the possessors

of the political sovereignty. Has democracy finished? and should it go no further? No; democracy, we believe, to be the most permanent factor in civilization and the strongest force of our time. The untrammeled sway of the people is now the master force of the world, and as the years proceed this power must overthrow all tyranny, all despotism, and all monopoly of social, industrial and political functions.

It is not practicable for the people of a great and populous state to meet in assemblages and enact measures for their common good; neither is it practicable for a monarch to exercise all the power necessary to govern such a state; but it is possible and practicable for intelligent citizens of the greatest of nations to meet at stated intervals and vote by the referendum and initiative upon the laws they deem necessary for their welfare, and it is also possible for a monarch or an aristocratic class to enact measures that will tyrannize and despoil the masses of the greatest nation. Hence we conclude the best government is that which conforms most nearly to the requirements of a progressive and aspiring people.

Sec. 32. SOURCES OF THE LAW.—By sources of the law we do not wish to be understood as meaning the depositories in which the law is recorded, as the statutes, reports and treatises; nor do we mean the authority which gives them the sanction of law, but we mean to discuss the channels through which principles have come which are now recognized and enforced by a sovereign political authority. It is to be understood that

these principles and rules are not laws in their earliest stages, any more than is the brook, which is the source of the river, entitled to be called a river until it has reached a certain definite stage of growth and recognition.

1. Custom as a Source of Law. A custom may result from the moral sense of mankind or from mere convenience. It develops as a path is formed across a common; one person passes across, others follow, and gradually a regular pathway is formed, which is easier to be followed than avoided. These customs may be quite general in extent or confined to locally limited communities. When they have become fixed and notorious the sovereignty in the state may see fit to recognize them, and they are thus raised to the dignity of laws. The courts sometimes give validity retrospectively to good customs, and the historical school of the origin of law claims this as an example where law arises from the intelligence of the people without an arbitrary political authority. But it is clear that the custom is only a law when passed upon by the sovereignty, and if this action is given a retrospective effect we do not see that it changes the conclusion. Holland's Jur., Ch. V.

2. Religion, or the Revealed Law. It was formerly supposed that Christianity was a part of the law of England. This is now questioned. In America Christianity has never been claimed to be a part of the law of the land. We have no union of church and state, nor has our government ever been vested with authority

to enforce any religious observance simply because it is religious. Of course, it is no objection, but, on the contrary, it is a high recommendation to a legislative enactment, based upon justice or public policy, that it is found to coincide with the precepts of a pure religion; nevertheless, the power to make the law rests in the legislative control over things temporal and not over things spiritual. Bloom v. Richards, 2 Ohio St. 387.

Thus religion may influence and assist in the development of the law, but the dogmas of religion are in no sense laws which will be enforced. This is well stated by the court in Bloom v. Richards, just cited, where it is said, "The statute prohibiting common labor on the Sabbath could not stand for a moment as the law of Ohio, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty. It is to be regarded as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day."*

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*Lest some might through mistaken zeal misunderstand the true reason for the separation of law from religion, we append the following clear reasoning from Professor Walker: "They commit an egregious error who consider jurisprudence as looking forward into eternity. It begins and ends with this world. It regards men only as members of civil society. It assists to conduct them from the cradle to the grave, as social beings; and there it leaves them to their final Judge. I would that this attribute of the law were more generally appreciated. * * * Religion and morality embrace both time and eternity in their mighty grasp; but human laws reach not beyond the

3. Adjudication as a Source of Law. Adjudication, or so-called judge-made law, arises from the fact that courts have the power to interpret and apply the law to the cases which come before them. In Europe the decisions of the court in applying the law to the facts are not binding or used as authorities in subsequent cases, other than as mere helps. But in the United States and England decisions of the courts are regarded as precedents, with considerable, though not conclusive, authority in subsequent cases. Thus by adjudication the law may be expanded and made to have a more far-reaching effect. Unless these decisions are expressly repudiated by the law-making power they become laws as of the express or implied intent of that power. I. Law Quart. Rev. 313.

4. Science. The scientifical and learned discourses and treaties of men who have made a life-long study of laws have weight in determining what the law is and ascertaining its proper application. In the Roman or civil law the "Responsa Prudentium," or decisions of the sages of the law, were given a recognized place in

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boundaries of time. As immortal beings they leave men to their conscience and their God. And though this consideration may seem, at first view, to detract from their dignity, I rejoice at it as a consequence of our absolute moral freedom. I rejoice that in this country at least government dares not interfere between man and his Creator. I know no higher subject of congratulation than the fact that we have confined our legislatures to their proper sphere; which is, to provide for our social welfare here on earth, and leave each to select his own pathway to immortality." Walker's Am. Law, 10, 11.

the laws. While the opinions of law writers are not now accepted as law, we can say that the monumental works of Coke, Hale, Lyttleton, Blackstone, Story, Cooley, Mechem, etc., are accepted sometimes as the best evidence of what the law was and is.

5. Equity as a Source of Law. Equity or the natural justice of men expanding with civilization made changes in the rigorous and comprehensive precepts of the law necessary. In Rome the Praetor had power to modify by an edict the strict letter of the law to suit the particular cases that came before him. These edicts, being preserved and followed by others, came to be regarded as laws. In England, the chancellor, a sort of clerk to the king, was delegated to dispense justice in cases where the common law of the realm was deficient, but to prevent this justice from becoming, as Selden thought, "a roguish thing," and as varying as the length of the different chancellors' noses, rules were established to regulate the chancellor's equitable jurisdiction, and these rules, together with the decisions of the chancery courts, are laws and shall be studied under the head of "Equity of Chancery Law."

A sixth source of law as given by Holland is legislation. This, he says, is the chief source of law. Hol. Jur., Ch. 5. We prefer to regard legislation not as a source of law, such as we have already described, but rather as the process by which rules of civil conduct, from whatever source, are, by the sanction of the supreme political authority of a state, changed into laws.

Sec. 33. LEGISLATION, OR LAW-MAKING.—Legislation is the process of law-making; the exercising of the power of sovereignty, and may be expressed or implied. The results of legislation are laws. These laws are either (1) written or (2) unwritten.

Sec. 34. WRITTEN LAWS.—The written law in the United States consists of constitutions, treaties and statutes.

(a) Constitutions. In America a constitution is a solemn written declaration of the people, and declared to be the fundamental law of the land. The United States Constitution is the supreme law and unites the people for all national purposes into a single Federal State. The State Constitutions are supreme within a State and unite the people for municipal purposes. Walker's Am. Law, 50, 51.

(b) Treaties. A treaty is a written compact entered into between two or more politically independent nations regulating their intercourse. These treaties are by the Constitution of the United States declared to be a part of the supreme law of the land. Art. VI., cl. 2, U. S. Const.

(c) Statutes. These include all laws duly enacted by the law-making authority and written down as a perpetual memorial of what the law really is. Statutes are either (1) Public, or (2) Private. Public statutes are those whose provisions are designed to regulate the entire community. Private statutes apply only to certain specified individuals or associations. Walker's Am. Law, 51.

Sec. 35. THE UNWRITTEN LAW.—The unwritten law literally means statutes that have never been recorded, or whose formal records have been lost. But as a matter of fact these statutes were never in existence, and the legislative sanction is implied rather than expressed. The unwritten law consists of the so-called common law, and equity or chancery law.

Sec. 36. THE COMMON LAW.—"The common law is said to be unwritten, because there is no record of its formal enactment. It is sometimes pretended that it consists of statutes worn out by time, their records having been lost. It is called a collection of customs and traditions, commencing in immemorial times, acquiesced in by successive generations, and gradually enlarged and modified in the process of civilization. The true account, however, is that it is the stupendous work of judicial legislation. Theorize as we may, it has been made from first to last by judges; and the only records it ever had are the reports of their decisions, and the essays, commentaries, and digests founded thereon. To explain its formation, we may suppose a question to have arisen in England centuries ago, respecting which the written law contained no provision. Upon presenting this question to the judge, he must either let a wrong go unredressed or make a law to meet the exigency. He chose the latter alternative; and in making up his decision, sought light from every available source. If a case exactly similar had before been decided, he would naturally adopt the decision then made. (The doctrine of Stare Decisis.) Or if an analogous case

could be found, he would adopt its principles so far as they would apply. If neither of these he would consult public policy and the abstract principles of natural justice. He would moreover be assisted by the arguments of the opposing counsel, who would present the case in all its bearings. With these aids, and in this manner, he would take up his decision; and if no sinister motive operated, the presumption is that it would be on the side of abstract right. Such briefly is the process by which the vast fabric of the common law has been reared. A succession of judges, during a long lapse of years, have contributed the results of their reason and learning to elaborate and perfect it. In its theory, each successive adjudication has become a precedent for all similar cases involving the same principle; and it is obvious that just in proportion as precedents are multiplied, the number of unprecedented cases must be diminished. Legislation, moreover, has been constantly supplying deficiencies. It follows, therefore, that the field of judicial discretion, almost boundless at first, has been gradually but steadily narrowing. Still, however, admitting precedents to be absolutely binding, which is not the fact, though it is the theory, judges even at this day exercise a far wider discretion under the common law than it is usually supposed by those not conversant with the subject. And to this extent there is not that complete separation between the legislative and judicial power, which the theory of our government supposes." Walker's Am. Law, 53.

"Of the United States as a nation, there is no com-

mon law. 'The Federal government is composed of sovereign and independent states, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption.' " Cooley's Bl., p. 69 n.; Wheaton v. Peters, 8 Pet. 658.

Sec. 37. EQUITY OR CHANCERY LAW.—In its literal acceptation, equity is nearly synonymous with justice, but in its technical sense it means chancery law, or that system of rules by which courts of chancery are governed in the administration of justice. This, like the common law, consists of precedents running through nearly the same lapse of time. Walker's Am. Law, 55.

Sec. 38. DEPOSITORIES OF THE LAW.—Where the law is to be found, or the legitimate depositories of the law, is an important point to the student.

The written law, embracing constitutions, treaties and statutes is to be found in the authorized public records. Both the National and State constitutions and statutes are published in authenticated editions, and these have been compiled and digested for the convenience of the profession.

The unwritten law, comprising the common law, and equity or chancery law, is not so easily located.

The common law, as we have seen, Sec. 36, consists of a vast mass of decisions supposedly resting upon former statutes. The record of these decisions is the only

authoritative depository of the common law. Legal experts and text-writers have written commentaries and books upon these decisions, which are also used to determine what the common law is.

These judicial precedents date back to the very beginning of English history. They accumulated in England and at the time of colonizing this country they were brought over the ocean as the heritage of the English settlers, where they have continued to accumulate up to the present moment. They are to be found in hundreds of volumes of reports, embracing the decisions of the various English and American courts, and the digested and abridged commentaries thereon. Walker's Am. Law, 7.

Equity or chancery law consists also of judicial precedents to a large extent and is to be found in the reports of the courts of chancery. The number of books containing these precedents of common and chancery law are estimated to be 1,500. Walker's Am. Law, 7.

Sec. 39. CODIFICATION OF LAWS.—The codification or systematic classification of statutory laws was early rendered necessary in the various States of the Union. The express regulations and enactments necessitated to establish local self-government, and to inaugurate a political and civil system under such novel circumstances as prevailed in America were soon so numerous that their revision, simplification and abridgment became necessary. This work of codification began as early as the beginning of the present century and has been found so efficacious as to commend itself to all

classes of citizens, and has led to the adoption by a number of States of a complete statutory, or code system of laws, designed to supersede the cumbrous and undigested mass of precedents which contain the common and chancery law. The States adopting these statutory codes are called code States, as distinguished from those in which the common law is still relied upon to a great extent.

The State Codes. The first attempt to codify the laws of any State were regarded as visionary schemes. A few clear-headed men believed that through statutes and classification it would be possible to get rid of the numerous distinct actions of the common law and to establish a uniform and comprehensive mode of proceeding without reference to any distinction between law and equity. The State of New York was the first to adopt such a comprehensive code in 1850. Other States have followed the example of New York, and it is possible that in time all the States will simplify their legal system. The codes as adopted by these States embrace four parts—Political, Civil, Remedial, Penal—and are intended to set forth in generalized and systematic form the principles of the entire law, whether written or unwritten, positive or customary, derived from enactments or from precedents, and within their scope to supersede all other laws. Abbott's Law Dict. "Code."

While the adoption of a code of laws has in some States superseded much of the common law, as well as common law terms and actions, it is still desirable for

the student of law in a code State to be more or less familiar with the law as it stood prior to the adoption of the new system. A knowledge of the forms that were superseded is frequently necessary to understand those that now exist, while most of the principles of the common law are either expressly or impliedly a constituent part of the code law.

"Nor are the works on common law pleading superseded by the new codes which have been introduced in many of the States. A careful study of those works is the very best preparation for the pleader, as well where a code is in force as where the old common law forms are still adhered to. Any expectation which may have existed, that the code was to banish technicality and substitute such simplicity that any man of common understanding was to be competent, without legal training, to present his case in due form of law, has not been realized. After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in logical manner, after the rules laid down by Stephen and Gould, is better prepared to draw a pleading under the code which will stand the test on demurrer than the man who, without that training, undertakes to tell his story to the court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little, or of presenting the

facts so inaccurately as to leave his rights in doubt on his own showing. Let the common law rules be mastered, and the work under the code will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted in coming to the new practice by the old road." Cooley's Introd. to Bl. Com., p. xxvii.

Sec. 40. DIVISIONS OR BRANCHES OF THE LAW.—Scientific divisions of the law, according to meaning and application, have been attempted by various writers, but inasmuch as their efforts in this line have produced no uniform classification we are led to assume that all such divisions must be rather for convenience of study than for scientific accuracy. We reproduce for convenience the most general classification as given by Blackstone and Walker.

Sec. 41. PUBLIC INTERNATIONAL LAW. By Public International Law, or the law of nations, we mean those equitable precepts which have on grounds of general convenience come to govern the intercourse between distinct nations or sovereign peoples. These rules, beginning in mere customs or usages, have come at the present time to have certain well-defined sanctions which cannot be easily disregarded. In some portions the international code has been enacted as a part of the municipal law of our country.

Sec. 42. PRIVATE INTERNATIONAL LAW. —Private International Law, or conflict of Laws, as it is also termed, arises from the fact that the internal laws of the various nations differ widely, and when a citizen of one nation comes into the jurisdiction of an-

other there is a conflict of laws, from which conflict has arisen rules of comity and practice which, as precedents, constitute Private International Law. So that "when citizens of one nation remove to or travel in another, and make contracts, acquire property, marry or die there, it is no longer a matter of doubt by which law their rights will be determined." Walker's Am. Law, 13.

Sec. 43. CONSTITUTIONAL LAW.—Having seen what it is that regulates the relations between nation and nation, we next come to the domestic laws of a nation regulating its own internal affairs. Every people in the course of their associated life have formulated certain fundamental provisions regarding the nature of their political organization, and limiting, as it were, the extent to which the individual is responsible to the collective whole. These principles circumscribing the powers of a political entity form the constitution of a nation. Whether these principles exist as mere unwritten usages and precedents, subject to the omnipotent will of parliament and capable of being overturned by an ordinary statute, as is the case in England, or consist of carefully formulated precepts of government, written out and adopted by the people as the supreme law of the land, they are equally designated as constitutions.

In the United States we have National and State Constitutions as a result of our dual form of government. The States, on gaining their independence, were distinct sovereignties; but "to promote the general wel-

fare," the sovereign people of the various States united in establishing a national sovereignty supreme in all matters delegated to it, while the individual States retained the sovereignty not delegated. The United States Constitution fixes the sphere of the national government; and the State Constitutions regulate the exercise of State sovereignty, thereby creating Federal and State Constitutional Law.

Sec. 44. LAW PERTAINING TO PERSONS.—By law pertaining to persons we mean statute and precedent law regulating the relations which members of political society can sustain towards each other; whether as male or females, infants or adults, masters or servants, or whether natural or artificial persons, acting for themselves or through others. So that under this division we have the subjects: Domestic Relations, Personal Rights, Public Corporations, Private Corporations, Partnerships, Principal and Agent, and Principal and Surety.

Sec. 45. LAW PERTAINING TO PROPERTY.—Property according to Blackstone is either Real or Personal; and Personal property is either in possession or in action, the latter including all the various kinds of contracts. Hence under things real and things personal, including the modes of acquiring and transferring property, we have the subjects: Real Property, Personal Property, Contracts, Negotiable Instruments, Bailments, and Wills.

Sec. 46. LAW PERTAINING TO CRIMES.—Public wrongs or crimes give rise to the division of

Criminal Law; and the application of this law is called Criminal Procedure. The two will be treated together.

Sec. 47. THE LAW OF PROCEDURE.—It is not only necessary that laws be declared, but also that they be applied or carried into effect. Law confers rights, but these must be enforced or a remedy given when they are transgressed. The former is called the field of substantive law, while the latter is procedure or adjective law. Under the latter head we have the subjects of Pleading, Practice, and Evidence. Equity might also be put under this head since it is chiefly remarkable for its peculiar rules of procedure.

Sec. 48. LEGAL ETHICS.—The moral principles and rules applying to and governing the relation between the lawyer and his client, the courts and the community are now termed "Legal Ethics" and constitute a regular branch upon which law students are examined. This subject will be appropriately treated in the Cyclopedia of Law.

Sec. 49. THE INTERPRETATION OF LAWS.—"The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law." Intro. Bl. Com., p. 59. These he explains as follows:

1. Words are generally to be understood in their usual and most known signification; not so much re-

garding the propriety of grammar, as their general and popular use. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade and science.

2. The "context," or that which precedes or follows the part in question, may be of singular use whenever there is an ambiguous, equivocal or intricate sentence. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is.

In States where the object or subject of a statute must be stated in the title, the title is of more importance and may control the construction. And it is a general rule that statutes upon the same subject must be construed with reference to each other; that is, that what is clear in one statute shall be called in to explain what is obscure in another.

3. As to the "subject matter," words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

4. As to the "effects and consequences," the rule is that where words bear either none, or a very absurd

signification, if literally understood, we must deviate a little from the received sense of them.

5. The last and most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the "reason and spirit" of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. * * * From this method of interpreting laws, by the reason of them, arises what we call equity, which is thus defined by Grotius: "The corrections of that wherein the law by reason of its universality is deficient." Intro. Bl. Com., pp. 59-61.

Sec. 50. LAW AND POPULAR INFLUENCE. —In the United States the people constitute the sovereign power. Delegates of the people make, construe and execute the laws. Popular influence thus decides largely both what the laws shall be, and how well they shall be observed. A law may be enacted and spread at large on the pages of the statute book, but if it does not appeal to the sense of right and justice of the people it soon becomes a dead letter, and its enforcement is not even attempted. But, on the other hand, if there is any wrong which the people see, and which appeals to their natural sense of justice a law is soon demanded to cover and redress it. Thus the real binding law in America, as has been remarked by Professor Mechem, is armed and organized public sentiment. "It is the formal and manifest expression of the public sense of justice. Not the aroused and abnormal impulses of the people in their moments of agitated fervor; not the

sense of justice of the few seers upon the mountain tops, to whom it is given to look with undimmed vision far over the distant boundaries into the promised land, but the moral sentiment, and the sense of justice of the great average masses of mankind at their normal periods. The truth is, law is written not alone upon tables of stone, or upon the printed pages of the statute book, but it has been inscribed in indelible characters by the finger of Almighty God upon the imperishable tablets of the human heart." From a lecture by Prof. Mechem to the graduating class at University of Michigan, 1896.

INFLUENCE OF THE AMERICAN LAWYER.—The potent and beneficial influence of the American lawyer is well expressed by these words of Prof. Mechem in the lecture above cited: "Who drafted our Declarations of Independence? Who framed our Constitutions? Who interpreted, defended and applied those Constitutions? Who has drawn our treaties? Who has led our nation in times of public peril? Who has issued our Proclamations of Emancipation? Who, in short, has been most prominent and most potent in securing and protecting our cherished institutions? I answer: More than any other class, it has been the lawyers of our country. Whether it was a Patrick Henry, rousing by his eloquence and patriotism his countrymen to resist oppression; or a Thomas Jefferson, drafting a Declaration of Independence; or a Madison, a Wilson, a Sherman and a score of others framing a Constitution; or a Hamilton, applying the

new Constitution to the pressing needs of the young republic; or a Marshall, laying broad and deep the principles of its interpretation; or a Webster, defending it against the attacks of its enemies; or a Lincoln, laying down his life that the government established by that Constitution should not perish from the earth—there never has been wanting some brave, high-minded, patriotic lawyer to fight and win the people's battles for their public liberties."

Political liberties have been secured by the aid of law; there is a growing desire and demand for industrial liberty. Shall not the lawyer be the means and instrument by which this new ideal, the hope and prayer of the people, shall be realized and crystallized into laws? We believe that he will prove as true and as potent in fulfilling this latter duty as he has been in the past. To the coming Henrys, Jeffersons, Lincolns, we bid a Godspeed and a welcome. We say, in the words of Adams, "At the bar is the scene of independence. Integrity and skill at the bar are better supporters of independence than any fortune, talents or eloquence elsewhere. * * * Presidents, governors, senators, judges, have not so much honest liberty; but it ought always to be regulated by prudence, and never abused." John Adams' Works, X., 21.

SUBJECTS TREATED IN THE CYCLOPEDIA OF LAW.

Public International Law.

Private International Law, { Will be treated in connection with other subjects.

National or Municipal Law.

- Constitutional Law: { Federal. State.
- Persons:
  1. Domestic Relations.
  2. Personal Rights.
  3. Partnerships.
  4. Principal and Agent.
  5. Principal and Surety.
  6. Public Corporations.
  7. Private Corporations.
- Property:
  1. Real Property.
  2. Personal Property.
  3. Contracts.
  4. Negotiable Instruments.
  5. Bailments.
  6. Wills.
- Crimes: { Criminal Law and Criminal Procedure.
- Procedure:
  1. Pleadings and Practice.
  2. Evidence.
- Chancery Law or Equity.
- Legal Ethics.

HELPS TO STUDENTS.

The Cyclopedia of Law is devoted entirely to the subject of law, but in these helps we desire to mention several subjects germane to law or necessary to its successful practice.

"It scarcely seems necessary," says Judge Cooley, "to remark that the student of American law ought to be well-grounded in English history, and to have studied the development of constitutional principles in the struggles and revolutions of the English people. It is idle to come to an examination of American constitutions without some familiarity with that from which they have sprung, and impossible to understand the full force and meaning of the maxims of personal liberty, which are so important a part of our law, without first learning how and why it was that they became incorporated in the legal system."

To those students who have not already had this grounding in English history we suggest that as a preliminary preparation to the study of the next number of this series—Constitutional Law—that some comprehensive English history be read carefully and notes made thereon. Nearly all libraries contain several standard English histories, any one of which will serve the student's purpose.

Again, the lawyer must, of necessity, use his voice, and this like his intellect to be of the most service and

benefit to him must be trained and developed. Skill in speaking has wrongly been supposed to be a natural talent; in some cases it may be so, but in the majority of instances the effective speaker has developed his powers of voice and action in the same manner as other capacities. Most lawyers in the course of years become good speakers, not to say orators, and this without being specially gifted in the beginning. Judge Cooley remarks that the learned man cannot well be dull when speaking of the science he has mastered, and Socrates exclaimed that all men are eloquent in that which they understand. Thus lawyers filled with the science they follow and earnest in their efforts to secure the rights of their clients unconsciously develop the three chief requisites of a good speaker, namely, clearness, force, and earnestness.

But if oratorical skill can be developed at the bar, it may also be developed to some extent while preparing for admission to the bar. We again quote from Judge Cooley who says in this regard, "Some experience in extempore speaking every young man ought to have before coming to the bar, and if he begin his practice without the discipline it would give, he cannot be certain that timidity and embarrassment will not overcome him at the outset of his career. Few men are Erskines and Patrick Henrys, gifted with powers that make their first essay a triumph; the first efforts are, almost necessarily, mortifying failures." The eminent judge advocates that these maiden efforts of the student should be made in small societies and among friends rather than before a

critical public audience, and concludes with the statement that, "Self-confidence the advocate must acquire; and, in order that he may possess it, he must have the necessary knowledge; and, secondly, he must have tried his powers until he is certain of them." Cooley's Intro. Bl. Com., p. xxviii.

To possess the ability to express one's thoughts in language simple and clear, should be the aim of every man whether or not he expects to become a public speaker, for no man of prominence, indeed, no man engaged in business of any character, passes through life without desiring at some time to publicly express his opinions. Having had previous experience in public speaking, he proclaims his views with ease and in a manner pleasing to his hearers. Experience in public speaking breeds confidence and self-possession, attributes which all men should possess, and which they can attain.

For the purpose of practice in speaking, as well as the advantages of association, we advise students, where possible, to form a club or society of such persons as are desirous of advancing themselves along this line. In almost every town or village a half dozen or more persons can be secured who will gladly embrace the opportunity to learn law as given by the Cyclopedia of Law. If care is taken in the selection of the persons forming these little groups they cannot help but be of great benefit to the individuals composing them. Roger North, the English historian, said: "A student of the law hath more than ordinary reason to be curious in his conversation, and to get such as are

of his own pretension, that is, to study and improvement; and I will be bold to say, that they shall improve one another by discourse as much as all their other study without it could improve them."

A further suggestion seems to be demanded since many of the persons who make use of this series of books will do so in their spare hours. Care must be taken not to neglect one's health, or to lose track of current events while securing this special training. And further, "the law student must not forget that he is fitting himself to be a minister of justice; and that he owes it to himself, to those who will be his clients, to the courts he shall practice in, and to society at large, that he cultivate carefully his moral nature to fit it for the high and responsible trust he is to assume. The temptations of dishonest gain and the allurements of dissipation are all the time leading to shame and ruin, from the ranks of our profession, a long and melancholy train of men once hopeful, perhaps gifted; but the true lawyer is pure in life, courteous to his associates, faithful to his clients, just to all; and the student must keep this true ideal before him, observe temperance, be master of his actions, and seek in all things the approval of his own conscience, if he would attain the highest possible benefit from the study of the law." Cooley's Intro. Bl. Com., p. xxxii.

PART II.

IN WHICH THE STUDENT IS INTRODUCED TO SIR WILLIAM BLACKSTONE, AND GIVEN A TASTE OF HIS IMMORTAL COMMENTARIES ON THE LAWS OF ENGLAND.

INTRODUCTORY.

Sir William Blackstone was born at London, July 10th, 1723, and died February 14th, 1780. The plan of his great work was completed at the age of thirty, when he delivered in Oxford, a course of lectures which, in the year 1765, took the form of "Blackstone's Commentaries on the Laws of England." Eight editions of this monumental work appeared in the author's lifetime, and a great many more have been published since. Among the English editors and annotators of Blackstone's work are Coleridge, Chitty, Christian, and others. Sharswood and Cooley are American editors of the same work. The edition of Blackstone's Commentaries by the late Judge Thomas M. Cooley, of Michigan, the well-known and respected jurist and author, is doubtless the best American edition, and is one of the first books to which the ambitious student of law is usually introduced.

William Blackstone not only made it his object to show that a knowledge of the laws of his country was of the first importance to every Englishman of rank

and distinction, and especially to those who aspired to be justices or legislators, but also aimed to put in palatable and accessible form the laws of England, so that every one who wished might come to a fair and accurate knowledge of the laws of his country. For this laudable and painstaking work thousands of students in England and America have offered and will offer unstinted praise to the author of the "Commentaries."

While England and America are greatly indebted to Blackstone for collecting and presenting in compact and intelligible form the laws of his land, yet the student to-day must not lose sight of the fact that even so great a genius and writer as he, could use his reasoning powers, apt sentences, and ready logic to the bolstering up of laws and institutions which his own best judgment must have told him were not to be justified in law or reason.

Blackstone was not an ideal jurist, he was simply a practical codifier; he had no care for the future of the law, only for the past; it was his task to find out what the law was and set it down, not to speculate what it might or should be to best answer the purposes of mankind. It is true that he commends many things in the common law and finds the origin of certain precepts in reason and natural justice, but nevertheless his vision is confined to the customs and institutions which immediately surround him; he has no light to throw a shadow of the higher and truer State wherein all should be equal in the eye of the law, and the whole people constitute the sovereign power; he finds no inconsistency in trust-

ing the administration of justice to the arbitrary instincts of a monarch; and utters not a word of protest against the grinding laws that the hereditary nobility enacted for the mulcting of a helpless people.

The student must bear in mind while perusing the first few chapters of the "Commentaries" that Blackstone was an Englishman, with all of the Englishman's sluggish hate towards new ideas in matters of law or custom, and that he became one of the King's justices and a staunch supporter of royalty, then he may understand the different sentiments expressed by Blackstone in his eulogy of the British Constitution (Com. Sec. 2, Intro.), and his remarks upon the laws governing land tenure (Com. Book II., page 2), from which we quote the following:

"There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. *Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.* We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testa-

ment of the dying owner; not caring to reflect that (accurately and strictly speaking) *there is no foundation in nature or natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him;* or why the occupier of a particular field or of a jewel, when lying on his deathbed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. *It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them.*"

NOTE.—The italics are the authors. What a commentary on class legislation do these few truthful utterances furnish.

These few lines from the second book of the "Commentaries" make it clear that Blackstone could see that there was no sound reason why a few should own the land and pass it on entailed to certain of their children while the rest should be denied the right to use the natural resources of the earth. But his philosophy was non-resisting; whatever is, is good, and it would make trouble to question it. He may have seen clearly that the laws pertaining to property were radically wrong, but it was not his purpose to raise a dissenting voice, or to advocate a needed reform; he was not of the class of the Roman Gracchi, or of Henry George. As a commentator then, Blackstone was but an apathetic reviewer, seeking simply to set forth the building as

it was, and caring nothing for needful repairs or additions.

Like Blackstone, many law writers, and legislators, and judges, of to-day, seek simply to apply the old rules as they were applied by the forefathers, refusing to consider that laws being for the purpose of governing and regulating the affairs of mankind should keep pace with man's activities and adapt themselves to the circumstances and conditions which surround him. That the laws to-day are lax in the regulation of modern commercial industries and in the controlling of a new type of malefactors which infest and prey upon modern society is evident by a perusal of the following quotation from an excellent article by Prof. Frank Parsons, in the July, 1901, number of the Arena:

"Slavery and serfdom have been abolished. Piracy is dead. The press-gang has vanished and thievery is trying to hide itself. Our principal robbers do not club their victims on the highways, but carry them in street cars and railway trains, or capture their money politely with stocks and trusts. Nothing has improved more than robbery. Instead of a dangerous encounter with pistols, to get the goods and cash that two or three travelers might have with them, the modern highwayman builds a railroad system with other people's money, or a gas or electric plant, or a street railway, or secures a telegraph or telephone franchise, or waters some stock, or gets a rebate on oil, beef, or wheat, or forms a giant trust and robs the population of a continent at a stroke. Then the robber buys a newspaper or caresses it with greenbacks, and has himself entitled a 'Napoleon of

Finance,' while the rudimentary, undeveloped aggressor or peculative survival of more primitive times who steals a bag of flour instead of a grain crop, or takes a few hundred instead of a million, has to put up with the old-time, uncivilized name of 'thief.' Imprisonment for debt has been abolished, and also imprisonment for theft—if it is committed according to the law and by methods approved by the particular variety of 'Napoleon' having control of the government."

Almost every citizen of this great Republic is palpably impressed with the truth of Professor Parson's caustic comments, but a vast number say with Blackstone that it is useless and troublesome to resist the "Napoleons" of finance and their unjust methods. It lies with the students of law, the statesmen and orators to come, to arouse the common people, and then the law will advance as it should. C. E. C.

NATURE OF LAWS.

SECTION II.*

OF THE NATURE OF LAWS IN GENERAL.

Law, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all movable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary laws for its direction,—as that the hand shall describe a given space in a given time, to

*Sections one and four of Blackstone's Introduction to his Commentaries have been left out as unimportant to the student to-day.

which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws, more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed [*39] again; the method of animal *nutrition, digestion, secretion and all other branches of vital economy; are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

This, then, is the general signification of law, a rule of action dictated by some superior being, and in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other,

has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him on whom he depends as the rule of his conduct; not, indeed, in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points, conform to his Maker's will.

This will of his Maker is called the law of nature. For as God, when he created matter, endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with freewill to conduct himself in all parts of *life, he laid down certain [*40] immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only as a being of infinite *power,* he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But, as he is also a being of infinite *wisdom,* he has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the eternal immutable laws of good and evil, to which the Creator himself, in all his dispensa-

tions, conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian (*a*) has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance, its inseparable companion. As, therefore, the Creator is a being not only of infinite *power* and *wisdom,* but also of infinite *goodness,* he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual con-

[*41] nexion of justice and human felicity, he *has

(*a*) *Juris praecepta sunt haec, honeste vivere, alterum non laedere suum cuique tribuere. Inst.* 1, *i.* 3.

not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have mainly surmised, but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law; for the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But, in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, un-

ruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine Providence, which, in compassion to the frailty, the imperfection, and the blindness [*42] of human reason, *hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we

imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws, that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points in which both the divine law and the natural leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and, from these prohibitions, arises the true unlawfulness of this crime. Those human laws that annex a punishment to it do not at all increase its moral guilt, or *superadd any fresh [*43] obligation, *in foro conscientiae,* to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such, for instance, as exporting of wool into foreign countries,—here the inferior legislature has scope and opportunity to inter-

pose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws than the law of nature, and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and, in a state of nature, we are all equal, without any other superior but Him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject, (*b*) is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities; in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject: and therefore

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(*b*) Puffendorf, *l.* 7, *c.* 1. compared with Barbeyrac's Commentary.

the civil law (*c*) very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur, jus gentium.*

*Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities or nations are governed; thus being defined by Justinian, (*d*) *"jus civile est quod quisque sibi populis constituit."* I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs. [*44]

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." Let us endeavour to explain its several properties, as they arise out of this definition. And, first, it is a *rule:* not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law:

(*c*) *Ff. i.* 1, 9.

(*d*) *Inst.* i. 2, 1.

for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity and universality, and therefore is properly a *rule.* It is also called a *rule,* to distinguish it from *advice* or *counsel,* which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation,* but upon the *maker's will.* Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

[*45] *It is also called a *rule* to distinguish it from a *compact* or *agreement;* for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be *"a rule."*

Municipal law is also "a rule *of civil conduct."* This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* con-

duct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion; duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "a rule *prescribed.*" Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *viva voce,* by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed* to be publicly read in churches [*46] and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius)

wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. (*e*) All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term *"prescribed."* But when this rule is in the usual manner notified or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state.*" For legis-

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(*e*) Such laws among the Romans were denominated *privilegia*, or private laws, of which Cicero (*de leg.* 3, 19, and in his oration *pro domo*, 17) thus speaks: "*Vetant leges sacratae vetant duodecim tabulae, leges privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit, nihil est crudelius, nihil perniciosius, nihil quod minus haec civitas ferre, possit.*"

lature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

*This will naturally lead us into a short inquiry concerning the nature of society and civil government; and the natural inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws. [*47]

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both of which were effected by the means of single families. These formed the first natural society among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein

the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood [*48] and implied, *in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior

can be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy: but the application of it to particular cases has occasioned one-half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the Supreme Being; the three grand requisites, I mean of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by *what right [*49] soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled

authority, in which the *jura summi imperii,* or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In *aristocracies [*50] there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hand of the prince: but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero (*f*) declares himself of opinion, "*esse optime con-*

(*f*) In his fragments, *de rep. l.* 2.

stitutam rempublicam quae ex tribus generibus illis, regali, optimo, et populari, sit modice confusa;" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure. (*g*)

But happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, *their [*51] birth, their wisdom, their valour, or their property; and, thirdly, the House of Commons, *freely chosen by the people from among themselves,* which makes it a kind of democracy: as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two;

(*g*) *Cunctas nationes et urbes populus aut primores, aut singuli regunt; delecta ex his et constituta republicae forma laudari facilius quam evenire vel, si evenit, haud diuturna esse potest."* *Ann. l.* 4.

each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity; either virtue, wisdom or power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made and well executed, but they might not always have the good of the people in view; if lodged in the king and commons we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should

be lost, or that it should become subservient to the views of either of the other two, there would *soon [*52] be an end of our constitution. The legislature would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society; and such a change, however affected is, according to Mr. Locke, (*h*) (who perhaps carries his theory too far,) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

Having thus cursorily considered the usual three species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his par-

(*h*) On government, part 2. sec. 212.

ticular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies, of men, to whom the supreme authority is entrusted; and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.

Thus far as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. For since the *respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. [*53]

But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state

assigns him, in order to promote and secure the public tranquillity.

From what has been advanced, the truth of the former branch of our definition, is (I trust) sufficiently evident; that *"municipal law is a rule of civil conduct prescribed by the supreme power in a state."* I proceed now to the latter branch of it; that it is a rule so prescribed, *"commanding what is right, and prohibiting what is wrong."*

Now in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

For this purpose every law may be said to consist of several parts: one *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and *laid down: another, *directory;* [*54] whereby the subject is instructed and enjoined to observe those rights and to abstain from the commission of those wrongs: a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction* or *vindicatory* branch of the law; whereby it is signified what evil

or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se,* such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all,

with regard to actions that are naturally and
[*55] intrinsically right or wrong. *But, with re-
gard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature, but are merely created by the law, for the purpose of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it becomes right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of the municipal law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declara-

tion being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen (*i*) that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or omit them.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect *without it. For in [*56] vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the *directory* part has "forbidden any one to enter on another's property, without the leave of the owner;" if Gaius after this will presume to take possession of the land, the *remedial* part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws, or the evil that may attend the breach of public duties, it is observed that human legislators have for the most part chosen to make the sanction of their laws rather *vindicatory* than *remuneratory,* or to consist rather in punishments, than

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(*i*) See page 43.

in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good. (*k*) For which reasons though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

[*57] *Of all the parts of a law the most effectual is the *vindicatory*. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

(*k*) Locke, Hum. Und. *b.* 2. *c.* 21.

Legislators and their laws are said to *compel* and *oblige*: not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only *persuade* and *allure;* nothing is *compulsory* but punishment.

It is true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights;* and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties,* and such offences as are *mala in se*: here we are bound in conscience; because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws, which enjoin only *positive duties,* and forbid only such things as are not *mala in se,* but *mala prohibita*

merely, without any intermixture of moral
[*58] guilt, *annexing a penalty to non-compliance,
(*l*) here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty:" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare, and against every person who possesses a partridge in August. And so too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty if levied. It must however, be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence. But where dis-

(*l*) See Book II, p. 420.

obedience to the law involves in it also any degree of public mischief or private injury, there it falls within our formal distinction, and is also an offence against conscience. (*m*)

I have now gone through the definition laid down of a municipal law; and have shown that it is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong;" in the explication of which I have endeavoured to interweave a few useful principles concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished by every rational civilian from those general constitutions which had only the nature of things for their guide. The emperor Macrinus, as his historian

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(*m*) *Lex pure poenalis obligat tantum ad pœnam, non item ad culpam; lex poenalis mixta et ad culpam, obligat, et ad poenam.* (Sanderson *de conscient, obligat, prael.* viii. §17, 24.)

Capitolinus informs us, had once resolved to
[*59] *abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise, (*n*) and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all:

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf (*o*) which forbad a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it

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(*n*) *Inst.* 1. 2. 6. (*o*) L. of N. and N. 5. 12. 3.

becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words, *"heirs of her body,"* which, in a legal sense, comprise only certain of her lineal descendants.

*2. If words happen to be still dubious, we may establish their meaning from the *context,* [*60] with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be a felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. As to the *subject matter,* words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by

the pope were called *provisions,* we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the *effects* and *consequences,* the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, (*p*) which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.

*5. But, lastly, the most universal and ef-
[*61] fectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. (*q*) There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the

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(*p*) *l.* 5. *c.* 12. §8. (*q*) *l.* 1. *c.* 11.

law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation.

From this method of interpreting laws, by the reason of them, arises what we call *equity,* which is thus defined by Grotius: (*r*) "the corrections of that wherein the law (by reason of its universality,) is deficient." For, since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which according to Grotius, *"lex non exacte definit, sed arbitrio boni viri permittit."*

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established *rules and fixed precepts [*62] of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, with-

(*r*) *De Equitatae,* §3.

out equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

SECTION III.

OF THE LAWS OF ENGLAND.

The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: The *lex non scripta,* the unwritten, or common law; and the *lex scripta,* the written, or statute law.

The *lex non scripta,* or unwritten law, includes not only *general customs,* or the common law properly so called; but also the *particular customs,* of certain parts of the kingdom; and likewise those *particular laws,* that are by custom observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptae,* I would not be understood as if all those laws were at present merely *oral,* or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws as well as learning to memory; (*a*) and it is said of the primitive Saxons, here

(*a*) Caes., *de b. G. lib.* 6, *c.* 13.

as well as their brethren on the continent, that *leges sola memoria et usu retinebant.* (*b*) But with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of
[*64] justice, in books of *reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptae,* because their original institution and authority are not set down in writing as acts of parliament are, but they receive their binding power and the force of laws by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that, which is *"tacito et illiterato hominum consensu et moribus expressum."*

Our ancient lawyers, and particularly Fortescue, (*c*) insist with abundance of warmth that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants to the present time, unchanged and unadulterated. This may be the case as to some; but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another; though doubtless, by the intermixture of adventitious

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(*b*) Spelm. Gl. 362. (*c*) C. 17.

nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby, in all probability, improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon, (*d*) are mixed as our language; and, as our language is so much richer, the laws are the more complete.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *Dome-Book,* or *Liber Judicialis,* for the general use of the whole king- [*65] dom. *This book is said to have been extant so late as the reign of King Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of King Edward the elder, the son of Alfred. (*e*) *"Omnibus qui republicae praesunt etiam atque etiam mano, ut omnibus aequos se praebeant judices, perinde ac in judicali libro scriptum habetur: nec quicquam formident quin jus commune audacter libereque dicant."*

(*d*) See his proposals for a digest. (*e*) C. 1.

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse, or at least to be mixed and debased with other laws of a coarser alloy; so that, about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts: 1. The *Mercen-Lage,* or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britains; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage,* or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage,* or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government. (*f*)

[*66] *Out of these three laws, Roger Hoveden (*g*) and Ranulphus Cestrensis (*h*) informs us,

(*f*) Hal. Hist. 55. (*g*) *In Hen. II.*
(*h*) *In Edw. Confessor.*

King Edward the Confessor extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom; though Hovenden, and the author of an old manuscript chronicle (*i*) assure us likewise that this work was projected and begun by his grandfather King Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs, as in Portugal, under King Edward, about the beginning of the fifteenth century. (*k*) In Spain under Alonzo X., who, about the year 1250, executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *Las Partidas.* (*l*) And in Sweden, about the same era, when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh,* being analogous to the *common law* of England. (*m*)

Both these undertakings of King Edgar and Edward the Confessor seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or domebook, with such additions and improvements as the experience of a century and a half had suggested; for Alfred is generally styled by the same historians the *legum Anglicanarum conditor,* as Edward the Confes-

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(*i*) *In Seld. ad Eadmer,* 6.
(*k*) Mod. Un. Hist. xxii. 135.
(*l*) *Ibid.* xx. 211.
(*m*) *Ibid.* xxxiii. 21, 58.

sor is the *restitutor*. These, however, are the laws which our histories so often mention under the name of the laws of Edward the Confessor, which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are [*67] the laws that so vigorously withstood *the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states of the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs which is now known by the name of the common law; a name either given to it in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or, more probably, as a law common to all the realm, the *jus commune*, or *folcright*, mentioned by King Edward the elder, after the abolition of the several provincial customs and particular laws before mentioned.

But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach, nothing being more difficult than to ascertain the precise beginning and the first spring of an ancient and long established custom.

Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex nonscripta,* of this kingdom.

This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which, for the most part, affect only the inhabitants of particular districts. 3. Certain particular laws; which, by custom, are adopted and used by some particular courts of pretty general and extensive jurisdiction.

* 1. As to general customs, or the common law, properly so called; this is that law, by [*68] which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences; with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example,

that there shall be four superior courts of record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims; as "that the king can do no wrong, that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage: and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath [*69] been always the custom to observe it. *But here a very natural, and very material, question arises: how are these customs and maxims to be known and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositories of the laws; the living oracles,

who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the *"viginti annorum lucubrationes,"* which Fortescue (*n*) mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records,* in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even, so early as the conquest, we find the *"praeteritorum memoria eventorum"* reckoned up as one of the chief qualifications of those who were held to be *"legibus patriae optime instituti."* (*o*) For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to

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(*n*) Cap. 8. (*o*) Seld. Review of Tith. c. 8.

his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently [*70] contrary to reason; *much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law;* but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. (*p*) And it hath been an ancient observation in the laws of England, that when-

(*p*) Herein agreeing with the civil law, *Ff.* 1. 3. 20. 21. "*Non omnium, quae a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum, quae constituuntur, inquiri non oportet: alioquin multa ex his quae certa sunt, subvertuntur.*"

ever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and *the law. For herein there is nothing re- [*71] pugnant to natural justice, though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not*

law. So that *the law,* and the *opinion of the judge,* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve as a guide for the future. (*q*)

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records, which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second inclusive; and, from his time, to

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(*q*) "*Si imperialis majestas causam cognitionaliter examinaverit, et partibus, cominus constitutis sententian dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causae pro qua producta est, sed et in omnibus similibus.*" *C.* 1. 14. 12.

that of Henry the *Eighth, were taken by the prothonotaries, or chief scribes of the court, at [*72] the expense of the crown, and published *annually,* whence they are known under the denomination of the *year books.* And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day; for, though King James the First, at the instance of Lord Bacon, appointed two reporters (*r*) with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief-Justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name. (*s*)

(*r*) *Pat.* 15 *Jac. I. p.* 18. 17 Rym. 26.

(*s*) His reports, for instance, are styled *the reports;* and, in quoting them, we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of Judge Croke are also cited in a peculiar manner, by the names of those princes, in whose reigns the cases reported in his three volumes were determined; *viz.*: Queen Elizabeth, King James, and King

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the *same learned judge we have just mentioned, Sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have [*73] little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the Fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method.(*t*) The second volume is a comment upon many old acts of parliament, without any

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Charles the First: as well as by the number of each volume. For sometimes we call them 1, 2. and 3. Cro. but more commonly Cro. Eliz., Cro. Jac. and Cro. Car.

(*t*) It is usually cited either by the name of Co. Litt. or as 1 Inst.

systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts. (*u*)

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

The Roman law, as practised in the times of its liberty, paid also a great regard to custom; but not so much as our law; it only then adopting it, when the written law was deficient. Though the reasons alleged in the digest (*v*) will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For, since (says Julianus,) the written law binds us for no other reason but because it is approved by the judgment of the people, therefore those laws which the people have approved without writing ought also to bind every body. For where is the difference, whether the people declare their *assent to a law by suffrage, or by a [*74]

(*u*) These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like. (*v*) *Ff.* 1. 3. 32.

uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but, when the imperial tyranny came to be fully established, the civil laws speak a very different language. *"Quod principi placuit legis habet vigorem, cum populus ei et in eum omne suum imperium et protestatem comferat,"* says Ulpian.(*w*) *"Imperator solus et conditor et interpres legis existimatur,"* says the code.(*x*) And again, *"sacrilegii instar est rescripto principis obviari."*(*y*) And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.(*n*)

(*w*) *Ff.* 1. 4. 1.

(*y*) *C.* 1. 23. 5. (*x*) *C.* 1. 14. 12.

(*n*) [Lord Chief-Justice Wilmot has said that "the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it is now law by usage or writing is the same thing. 2 Wils. 348. And statute law, and common law, both originally flowed from the same fountain." Ib. 350. And to the same effect Lord Hale declares, "that many of those things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record." Hist. Com. Law, 66. Though this is the probable origin of the greatest part of the common law, yet much of it certainly has been introduced by usage, even of modern date, which general convenience has adopted. Of this nature is the law of the road, viz.: that horses and carriages should pass each other on the whip hand. This law has not been enacted by statute, and is so modern, that perhaps this is the first time

II. The second branch of the unwritten laws of England are particular customs, or laws, which affect only the inhabitants of particular districts.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which the common law, as it now stands, was collected at first by King Alfred, and afterwards by King Edgar and Edward the Confessor: each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament. (z)

Such is the custom of gavelkind in Kent, and some other parts of the kingdom (though perhaps it was also general till the Norman conquest), which ordains, among other things, *that not the [*75] eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though

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that it has been noticed in a book of law. But general convenience discovered the necessity of it, and our judges have so far confirmed it, as to declare frequently at nisi prius, that he who disregards this salutary rule is answerable in damages for all the consequences.]—*Cooley's Blackstone, page 73, n.*

(z) *Mag. Cart.* 9 Hen. III. c. 9. —1. Edw. III. St. 2. c. 9. —14 Edw. III. St. 1. c. 1. —and 2 Hen. IV. c. 1.

the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas, at the common law, she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors. Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns, the right of holding which, when no royal grant can be shewn, depends entirely upon immemorial and established usage. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament. (*a*)

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the customs of merchants, or *lex mercatoria:* which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it; (*b*) being allowed, for the benefit

(*a*) 8 Rep. 126. Cro. Car. 347. (*b*) Winch. 24.

of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that *"cuilibet in sua arte credendum est."*

The rules relating to particular customs regard either the *proof* of their existence; their *legality* when proved; or their usual method of *allowance.* And first we will consider the rules of *proof.*

*As to gavelkind, and borough-English, the law takes particular notice of them, (*c*) and there is no occasion to prove that such customs ac- [*76] tually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded, (*d*) and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. The trial in both cases (both to shew the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to shew "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court. (*e*)

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder; (*f*) unless it be such a custom as the

(*c*) Co. Litt. 175. (*d*) Litt. §265.

(*e*) Dr. and St. 1. 10. (*f*) Cro. Car. 516.

corporation is itself interested in, as a right of taking toll, &c., for then the law permits them not to certify on their own behalf. (*g*)

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used; *Malus usus abolendus est,* is an established maxim of the law. (*h*) To make a particular custom good, the following are necessary requisites.

1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it, is no good custom. For which reason no custom can prevail against an express act of *parliament, since the statute itself is a proof of a time when such a custom [*77] did not exist. (*i*)

2. It must have been *continued.* Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right;* for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. (*j*) As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right*

(*g*) Hob. 85.
(*h*) Litt. §212. 4 Inst. 274.
(*i*) Co. Litt. 114.
(*j*) Co. Litt. 114.

be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable,* and acquiesced in; not subject to contention and dispute.(*k*) For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable;*(*l*) or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, (*m*) to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his, and then the tenants will lose all their profits.(*n*)

*5. Customs ought to be *certain.* A custom, that lands shall descend to the most worthy of [*78] the owner's blood, is void; for how shall this

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(*k*) *Ibid.* (*l*) Litt. §212. (*m*) 1. Inst. 62.
(*n*) Co. Copyh. § 33.

worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good.(*o*) A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest.*

6. Customs, though established by consent, must be (when established) *compulsory;* and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand

(*o*) 1 Roll. Abr. 565.

together. He ought rather to deny the existence of the former custom.(*p*)

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years *may, by one [*79] species of conveyance, (called a deed of feoffment), convey away his lands in fee simple, or forever. Yet this custom does not impower him to use any other conveyance, or even to lease them for seven years; for the custom must be strictly pursued.(*q*) And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone.(*r*) And thus much for the second part of the *leges non scriptae,* or those particular customs which affect particular persons or districts only.

III. The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.(*s*)

It may seem a little improper at first view to rank these laws under the head of *leges non scriptae,* or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees and decretals; and enforced by an im-

(*p*) 9 Rep. 58.
(*q*) 9 Co. Cop. §33.
(*r*) Co. Litt. 15.
(*s*) Hist. C. L. c. 2.

mense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of Sir Matthew Hale,(*t*) because it is most plain, that it is not on account of their being *written* laws that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority, which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here; for the legislature of England doth not, nor ever did, recognize any foreign power as superior or equal to it in this kingdom, or as having the right to give law to any, the [*80] meanest, of its subjects. But all the *strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptae,* or customary laws; or else because they are in some other cases introduced by consent of parliament, and they owe their validity to the *leges scriptae,* or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII, c. 21, addressed to the king's royal majesty:

(*t*) Hist. C. L. c. 2.

"This your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm, for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman Empire, as comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the *decemviri,* then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum,* or opinions of learned lawyers, *and lastly upon the imperial [*81] decrees, or constitutions of successive emperors), had grown to so great a bulk, or, as Livy expresses it,

(*u*) *"tam immensus aliarum super alias ascervatarum legum cumulus,"* that they were computed to be many camels' load by an author who preceded Justinian.(*v*) This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled A. D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms; for Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

This consists of, 1. The institutes, which contain the elements or first principles of the Roman law in four books. 2. The digest, or pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books, the lapse of a whole century having rendered the former code of Theodosius imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing

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(*u*) *l.* 3. *c.* 34. (*v*) Taylor's Elements of Civil Law, 17.

new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis,* as published about the time of Justinian; which, however, fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi, in Italy; which accident, concurring with the policy of the Roman ecclesiastics, suddenly gave new vogue and authority to the civil law, introduced it into several nations, and *occasioned that mighty inundation of volum- [*82] inous comments, with which this system of law, more than any other, is now loaded.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and decretal epistles and bulls of the holy see; all which lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, one Gratian, an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia Discordantium Canonum,* but which are generally known by the name of *Decretum Gratiani.* These reached as low as the time of Pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX, were published in much the same method, under the

auspices of that pope, about the year 1230, in five books, entitled, *Decretalia Gregorii Noni.* A sixth book was added by Boniface VIII, about the year 1298, which is called *Sextus Decretalium.* The Clementine constitutions, or decrees of Clement V, were in like manner authenticated in 1317, by his successor John XXII, who also published twenty constitutions of his own, called the *Extravagantes Joannis,* all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes:* and all these together, Gratian's decree, Gregory's decretals, the sixth decretals, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici,* or body of the Roman canon law.

Besides these pontifical collections, which, during the times of popery, were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church* and kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from Pope Gregory IX and Pope Clement IV, in the reign of King Henry III, about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry III, to Henry Chichelle, in the reign of Henry V; and

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adopted also by the province of York (*x*) in the reign of Henry VI. At the dawn of the reformation, in the reign of King Henry VIII, it was enacted in parliament (*y*) that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity, (*z*) whatever regard the clergy may think proper to pay them.

There are four species of courts in which the civil and canon laws are permitted, under different restrictions, to be used: 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts Christian *curiae Christianitatis,* or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universi-

(*x*) Burn's Eccl. Law, pref. viii.

(*y*) Statute 25 Hen. VIII. c. 19, revived and confirmed by 1 Eliz. c. 1.

(*z*) Stra. 1057.

ties. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom, corroborated in the latter instance by [*84] act of *parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them. (*a*)

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction

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(*a*) Hale, Hist. c. 2.

exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege;* and that, thus admitted, restrained, altered, new-modeled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

*Let us next proceed to the *leges scriptae,* the written laws of the kingdom, which are [*85] statutes, acts or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled.(*b*) The oldest of these now extant, and printed in our statute books, is the famous *magna charta,* as confirmed in parliament 9 Hen. III, though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice

(*b*) 8 Rep. 20.

of the different kinds of statutes, and of some general rules with regard to their construction.(*c*)

First, as to their several kinds. Statutes are either *general* or *special, public* or *private.* A general or public act is an *universal rule, that regards the [*86] whole community; and of this the courts of law are bound to take notice judicially and *ex*

(*c*) The method of citing these acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject, as the statutes of Wales and Ireland, the *articuli cleri*, and the *praerogativa regis.* Some are distinguished by their initial words, a method of citing very ancient, being used by the Jews in denominating the books of the Pentateuch: by the Christian church in distinguishing their hymns and divine offices: by the Romanists in describing their papal bulls; and, in short, by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis.* But the most usual method of citing them, especially since the time of Edward the Second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to its numeral order, as 9 Geo. II. c. 4, for all the acts of one session of Parliament taken together made properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the bill of rights is cited as 1 W. and M. St. 2. c. 2, signifying that it is the second chapter or act of the second statute, or the laws made in the second session of parliament, in the first year of King William and Queen Mary.

officio; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; such as the Romans entitled *senatus-decreta,* in contradistinction to the *senatus consulta,* which regarded the whole community; (*d*) and of these (which are not promulgated with the same notoriety as the former,) the judges are not bound to take notice, unless they be formally shewn and pleaded. Thus, to show the distinction, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation; but an act to enable the bishop of Chester to make a lease to A. B. for sixty years is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium,* and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III, cap. 2, doth not make any new species of treasons, but only, for the

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(*d*) Gravin, *Orig.* i. §24

benefit of the subject, declares and enumerates those several kinds of offence which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) Judges, or from any other cause whatsoever. And this being done, either by enlarging the common law, where it was too narrow and circumscribed, or by re-
[*87] straining it *where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. To instance again in the case of treason: clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law; therefore it was thought expedient, by statute 5 Eliz. c. 11, to make it high treason, which it was not at the common law; so that this was an *enlarging statute.* At common law also spiritual corporations might lease out their estates for any term of years till prevented by the statute 13 Eliz. before mentioned: this was therefore, a *restraining* statute.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law

stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. (*e*) Let us instance again in the same restraining statute of 13 Eliz. c. 10: By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives, or twenty-one years. Now in the construction of this statute, it is held that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see: or, if made by a dean and chapter, they are not void during the continuance of the dean; for the act was made for the benefit and protection of the successor. (*f*) The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the *grantors; but the leases, during their continuance, being not within the mischief, are not within the remedy. [*88]

2. A statute, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute, treating of "deans, prebendaries, parsons, vicars, *and others hav-*

(*e*) 3 Rep. 7 Co. Litt. 11. 42.

(*f*) Co. Litt. 45. 3 Rep. 60. 10 Rep. 58.

ing spiritual promotion," is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order. (*g*)

3. Penal statutes must be construed strictly. Thus the statute 1 Edw. VI, c. 12, having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one *horse,* and therefore procured a new act for that purpose in the following year. (*h*) And to come nearer our own times, by the statute 14 Geo. II, c. 6, stealing sheep, *or other cattle,* was made felony, without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II, c. 34, extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves and lambs, by name.

4. Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here

(*g*) 2 Rep. 46.

(*h*) 2 and 3 Edw. VI. c. 33. Bac. Elem. c. 12.

it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, &c., made to defraud creditors *and others,* was *held to extend by the general words to a gift [*89] made to defraud the queen of a forfeiture. (*i*)

One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament, saving the right of A., and A. has at that time a lease of it for three years: here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

6. A saving, totally repugnant to the body of the act, is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.; in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king. (*k*)

7. Where the common law and the statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon a general principle of universal law, that *"leges posteriores, priores contrarias abrogant;"* consonant to which

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(*i*) 3 Rep. 82. (*k*) 1 Rep. 47.

it was laid down by a law of the twelve tables at Rome, that *"quod populus postremum jussit, id jus ratum esto."* But this is to be understood, only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end. (*l*) But [*90] if both acts be merely affirmative, *and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a later law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere.* (*m*)

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the

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(*l*) Jenk. Cent. 2. 73. (*m*) 11 Rep. 63.

statutes of 26 and 35 Henry VIII, declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in Queen Elizabeth's statute, but these acts of King Henry were impliedly and virtually revived. (*n*)

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII, c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecution for high treason; but will not restrain or clog any parliamentary attainder. (*o*) Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavor to tie up the hands of succeeding legislatures. "When you repeal the *law itself, (says he,) [*91] you at the same time repeal the prohibitory clause, which guards against such repeal." (*p*)

10. Lastly, acts of parliament that are impossible to be performed are of no validity; and if there arise out

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(*n*) 4 Inst. 325. (*o*) 4 Inst. 43.

(*p*) *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat. l. 3. cp. 23.*

of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, the acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. (*q*) But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there

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(*q*) 8 Rep. 118.

is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

These are the several grounds of the laws of England; over and above which, equity is also frequently called in to *assist, to moderate and to explain them. What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject: to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our courts of equity, which however are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public

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liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.

BOOK THE FIRST

OF THE RIGHTS OF PERSONS

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

The objects of the laws of England are so very numerous and extensive, that in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

*Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero, (*a*) and after him our Bracton, (*b*) have expressed it, *sanctio justa, jubens honesta et prohibens contraria,* it follows that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution, therefore, of these commentaries, I shall follow this very simple and obvious division; and shall, in the first place, consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden, by the laws of England. [*122]

(*a*) 11 *Philipp.* 12. (*b*) *l.* 1. *e.* 3.

Rights are, however, liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum,* or the *rights of persons;* or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person; which are styled *jura rerum,* or the *rights of things.* Wrongs also are divisible into, first, *private wrongs,* which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly *public wrongs,* which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

The objects of the laws of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts. 1. *The rights of persons,* with the means whereby such rights may be either acquired or lost. 2. *The rights of things,* with the means also of acquiring and losing them. 3. *Private wrongs,* or civil injuries; with the means of redressing them by law. 4. *Public wrongs,* or crimes and misdemeanors; with the means of prevention and punishment.

We are now first to consider the *rights of persons,* with the means of acquiring and losing them.

[*123] *Now the rights of persons that are commanded to be observed by the municipal laws are of two sorts: first, such as are due *from* every citizen, which are usually called civil *duties;* and, secondly, such as belong *to* him, which is the more popular acceptance of *rights* or *jura.* Both may indeed be comprised in

this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are reciprocally the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense ; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, wheth-

er out of society or in it. But with regard to
[*124] the absolute *duties,* which man is bound *to per-
form considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like,) they then become, by the bad example they set, of pernicious effects to society: and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But, with respect to *rights,* the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which

were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these is clearly a subsequent consideration. And therefore the principal view of human law is, or ought always to be to explain, protect, and enforce such rights as are absolute, which in *themselves are few and simple: [*125] and then such rights as are relative, which arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit; without any restraint or control, unless by the law of

nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrified to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. (*c*) Hence we may collect that the law, [*126] which restrains a man from doing *mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our

(*c*) *Facultas ejus, quod cuique facere libet nisi quid vi aut jure prohibetur. Inst.* 1. 3. 1.

consent, if they regulate and constrain our conduct in matters of mere indifference without any good end in view, are regulations destructive of liberty ; whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance ; by supporting that state of society, which alone can secure our independence. Thus the statute of King Edward IV, (*d*) which forbade the fine gentlemen of those times (under the degree of a lord) to wear pikes on their shoes or boots of more than two inches in length, was law that savoured of oppression ; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles II, (*e*) which prescribes a thing seemingly indifferent, (a dress for the dead, who are all ordered to be buried in woollen) is a law consistent with public liberty : for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive, but rather introductive of liberty ; for, as Mr. Locke has well observed, (*f*) where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire

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(*d*) 3 Edw. IV. c. 5. (*e*) 30 Car. II St. 1. c. 3.
(*f*) On Gov. p. 2. §57.

master of his own conduct, except in those points wherein the public good requires some direction or restraint.

The idea and practice of this political or civil liberty flourish in their highest vigor in these kingdoms, [*127] where it falls *little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman; (*g*) though the master's right to his service may *possibly* still continue.

The absolute rights of every Englishman, which, (taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change; their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant

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(*g*) Salk. 666. See ch. 14.

as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments : and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level ; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

First, by the great charter of liberties, which was obtained, sword in hand, from King John, and afterwards, with some alterations, confirmed in parliament by King Henry the Third, his son. Which charter contained very few new grants ; but, as Sir Edward Coke (*h*) observes, was for the most part declaratory of the principal grounds of the fundamental [*128] *laws of England. Afterwards by the statute called *confirmatio cartarum,* (*i*) whereby the great charter is directed to be allowed as the common law ; all judgments contrary to it are declared void ; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people, and sentence of excommunication is directed to be as constantly denounced against all those that, by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two,) (*k*) from the first

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(*h*) 2 Inst. proem.

(*i*) 25 Edw. 1.

(*k*) 2 Inst. proem.

Edward to Henry the Fourth. Then, after a long interval, by *the petition of right;* which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the Second. To these succeeded *the bill of rights,* or declaration delivered by the lords and commons to the prince and princess of Orange, 13th of February, 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words: "and they do claim, demand, and insist upon, all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself (*l*) recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century, in the *act of settlement,* (*m*) whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate era, for better securing our religion, laws and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law. (*n*)

(*l*) 1 W. and M. St. 2, c. 2. (*m*) 12 and 13 W. III, c. 2.
(*n*) Plowd. 55.

*Thus much for the declaration of our rights and liberties. The rights themselves, thus de- [*129] fined by these several statutes, consist in a number of private immunities ; which will appear from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience ; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind ; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles ; the right of personal security, the right of personal liberty and the right of private property : because, as there is no other known method of compulsion or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual : and it begins in contemplation of law as soon as an infant is able to stir

in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb ; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child ; this, though not murder, was by the ancient law homicide or manslaughter. (*o*) But the modern law doth [*130] not look *upon this offence in quite so atrocious a light but merely as a heinous misdemeanor (*p*).

An infant *in ventre sa mere,* or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it ; (*q*) and it is enabled to have an estate limited to its use, and to take afterwards by such limitation as if it were then actually born. (*r*) And in this point the civil law agrees with ours. (*s*)

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also gifts of the wise Creator, to enable him to protect himself from external injuries

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(*o*) *Si aliquis mulierem pregnantum percusserit, vel ei venenum dederit, per quod fecerit abortivam; si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium.* Bracton, *l.* 3 *c.* 21.

(*p*) 3 Inst. 50. (*q*) Stat. 12 Car. II, c. 24.

(*r*) Stat. 10 and 11 W. III, c. 16.

(*s*) *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur. Ff.* 1. 5. 26.

in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo,* or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act: these, though accompanied with all the other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. (*t*) And the same is also a sufficient excuse for the commission of many misdemeanors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress,* from the Latin *durities* of which there are two *sorts: duress [*131] of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas,* where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reasons; *"non,"* as Bracton expresses it, *"suspicio cujuslibet vani et meticulosi hominis, sed*

(*t*) 2 Inst. 483.

talis qui possit cadera in virum constantem; talis enim debet esse metus, qui in se contineat vitae periculum, aut corporis cruciatum." (*u*) A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: (*w*) but no suitable atonement can be made for the loss of life or limb. And the indulgence shewn to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; *ignoscitur ei qui sanguinem suum qualiter, qualiter redemptum voluit.* (*x*)

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine, commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle

(*u*) *l.* 2. *c.* 5. (*w*) 2 Inst. 483.
(*x*) *Ff.* 48. 21. 1.

as our foundling hospitals, though comprised in the Theodosian code, (*y*) were rejected in Justinian's collection.

*These rights, of life and member, can only be determined by the death of the person ; which was formerly accounted to be either a civil or natural death. [*132] The civil death commenced, if any man was banished or abjured the realm (*z*) by the process of the common law, or entered into religion ; that is, went into a monastery, and became there a monk professed; in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society ; and such a monk, upon his profession, renounced solemnly all secular concerns : and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations. (*a*) A monk was therefore accounted *civiliter mortuus,* and when he entered into religion might, like other dying men, make his testament and executors : or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might

(*y*) *L.* 11. *t.* 27. (*z*) Co. Litt. 133.

(*a*) This was also a rule in the feudal law. *l.* 2. *t.* 21. "*desiit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium.*"

bring the same actions for debts due *to* the religious, and were liable to the same actions for those due *from him,* as if he were naturally deceased. (*b*) Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof ; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due. (*c*) In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion : for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life. (*d*) But *even [*123] in the time of popery, the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts ; (*e*) and therefore, since the reformation, this disability is held to be abolished : (*f*) as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I, c. 28.

This natural life being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-

(*b*) Litt. §200. (*c*) Co. Litt. 133.
(*d*) 2 Rep. 48. Co. Litt. 132.
(*e*) Co. Litt. 132. (*f*) 1 Salk. 162.

creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedients, and legality of which, we may hereafter more conveniently inquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical; and that, whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. *"Nullus liber homo,"* says the great charter, (*g*) *"aliquo modo destruatur, nisi per legale judicum parium suorum aut per legem terrae."* Which words, *"aliquo modo destruatur,"* according to Sir Edward Coke, (*h*) include a prohibition, not only of *killing* and *maiming,* but also of *torturing,* (to which our laws are strangers,) and of

(*g*) c. 29. (*h*) 2 Inst. 48.

every oppression by colour of an illegal authority. And it is enacted by the statute 5. Edw. III, c. 9, that no man shall be fore-judged of life or limb con-
[*134] trary to the great charter and the *law of the land : and again, by statute 28 Edw. III, c. 3, that no man shall be put to death, without being brought to answer by due process of law.

3. Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding ; though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it ; and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice ; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come,) it will suffice to have barely mentioned among the rights of persons : referring the more minute discussion of their several branches to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

II. Next to personal security, the law of England regards, asserts, and preserves, the personal liberty of

individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great *charter (*i*) is, that no freeman shall be [*135] taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes (*j*) expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16, Car. I, c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus,* to bring his body before the court of king's bench

(*i*) c. 29.

(*j*) 5 Edw. III, c. 9. 25 Edw. III, St. 5. c. 4. 28 Edw. III, c. 3.

or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II, c. 2, commonly called the *habeas corpus* act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. and M. St. 2, c. 2, that excessive bail ought not to be required.

Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown,) (*k*) there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magis-
[*136] trate, *are less dangerous to the common-wealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny

(*k*) I have been assured, upon good authority that, during the mild administration of Cardinal Fleury, above 54,000 *lettres de cachet* were issued, upon the single grounds of the famous bull *unigenitus*.

throughout the whole kingdom ; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient ; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing ; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, *"dent operam consules, ne quid respublica detrimenti capiat,"* was called the *senatus consultum ultimae necessitatis.* In like manner this experiment ought only to be tried in cases of extreme emergency ; and in these the nation parts with its liberty for awhile, in order to preserve it for ever.

The confinement of the person, in any wise, is an imprisonment ; so that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. (*l*) And the law so much discourages unlawful

(*l*) 2 Inst. 589.

confinement, that if a man is under *duress of imprisonment,* which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like ; he may allege this duress, and avoid the extorted bond. But if a man be lawfully impris-
[*137] oned, *and, either to procure his discharge, or on any other fair account, seals, a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. (*m*) To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison ; which warrant must be in writing, under the hand and *seal* of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus.* If there be no cause expressed, the gaoler is not bound to detain the prisoner ; (*n*) for the law judges, in this respect, saith Sir Edward Coke, like Festus the Roman governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

A natural and regular consequence of this personal liberty is that every Englishman may claim a right to abide in his own country so long as he pleases ; and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ *ne exeat regnum,* and prohibit any of his subjects from going into foreign parts without license. (*o*) This may be necessary for the public service and

(*m*) 2 Inst. 482. (*n*) Ibid. 52. 53.
(*o*) F. N. B. 85.

safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will; no not even a criminal. For exile and transportation are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter(*p*) declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II, c. 2, (that second *magna carta,* and stable bulwark of our liberties,) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas, (where *they cannot have the full benefit and protec- [*138] tion of the common law); but that all such imprisonments shall be illegal; that the person who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *praemunire,* and be incapable of receiving the King's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abettors; and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

(*p*) C. 29.

The law in this respect is so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon the public service ; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception : he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. (*q*) For this might, in reality, be no more than an honourable exile.

III. The third absolute right, inherent in every Englishman, is that of property : which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries : but certainly, the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society ; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter (*r*) has declared that no

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(*q*) 2 Inst. 46. (*r*) C. 29.

freeman shall be disseised, or divested, of his freehold, or of his liberties, or free *customs but [*139] by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes (*s*) it is enacted that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land ; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be fore-judged by course of law ; and if anything be done to the contrary it shall be redressed and holden for none.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it ; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public ; but the law permits no man, or set of men to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community ; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature

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(*s*) 5 Edw. III, c. 9. 25 Edw. III, St. 5. c. 4. 28 Edw. III, c. 3.

alone can, and indeed frequently does interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner ; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price ; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

*Nor is this the only instance in which the [*140] law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I, c. 5 and 6, it is provided that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I., St. 4. c. 1, which (*t*) enacts,

(*t*) See the introduction to the great charter (*edit. Oxon*) *sub anno* 1297; wherein it is shewn that this statute *de talliagio non concedendo*, supposed to have been made in 34 Edw. I, is in reality, nothing more than a sort of translation into Latin of the *confirmatio cartarum*, 25 Edw. I, which was originally published in the Norman language.

that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land : and again by 14 Edw. III, St. 2, c. 1, the prelates, earls, barons and commons, citizens, burgesses and merchants, shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right, 3 Car. I, that no man shall be compelled to yield any gift, loan, or benevolence, tax or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. and M. St. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence or prerogative, without grant of parliament, or for longer time, or in other manner, than the same is or shall be granted ; is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the *constitution had pro- [*141] vided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of per-

sonal security, personal liberty, and private property. These are:

1. The constitution, powers, and privileges of parliament; of which I shall treat at large in the ensuing chapter.

2. The limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. Of this, also, I shall treat in its proper place. The former of these keeps the legislative power in due health and vigor, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta* (*u*) spoken in the person of the king, who in judgment of law, says Sir Edward Coke, (*w*) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*: "and therefore every subject," continues the same learned author, "for injury

(*u*) C. 29. (*w*) 2 Inst. 55.

done to him *in bonis, in terris, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of parliament, [*142] *wherein justice is directed to be done according to the law of the land; and what that law is every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall, however, just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *magna carta* (*x*) that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III, c. 8, and 11 Ric. II, c. 10, it is enacted that no commands or letters shall be sent under the great seal or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III, St. 4. And by 1 W. and M. St. 2, c. 2, it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by legal authority, without consent of parliament, is illegal.

(*x*) c. 29.

Not only the substantial part, or judicial decision, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared, in the statute 16 Car. I, c. 10, upon the dissolution of the court of starchamber, that neither his majesty, nor his privy council have any jurisdiction, power, or authority, by English bill, petition, articles, libel, (which were the course of proceeding in the starchamber, borrowed from the civil law,) or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.

4. *If there should happen any uncommon [*143] injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told (*y*) that the Czar Peter established a law, that no subject might petition the throne till he had first petitioned two different ministers of state. In case he ob-

(*y*) Montesq. Sp. L. xii. 26.

tained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong: the consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and, while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest under the pretence of petitioning, the subject be guilty of any riot or tumult, as happened in the opening of the memorable parliament in 1640: and to prevent this, it is provided by the statute 13 Car. II, St. 1, c. 5, that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the country; and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But under these regulations it is declared by the statute 1 W. and M. St. 2, c. 2, that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are *allowed by law. Which [*144] is also declared by the same statute, 1 W. and

M. St. 2, c. 2, and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen : liberties more generally talked of than thoroughly understood ; and yet highly necessary to be perfectly known and considered by every man of rank and property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free ; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour ; and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law ; next, to the right of petitioning the king and parliament for redress of grievances; and lastly, to the right of having and using arms for self-preser-

vation and defence. And all these rights and liberties it is our birthright to enjoy entire ; unless where the laws of our country have laid them under necessary restraints : restraints in themselves so gentle and moderate, as will appear, upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do ; and are restrained from nothing but what would be pernicious either to ourselves or our fellow citizens. So that this [*145] review *of our situation may fully justify the observation of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom, (z) and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political or civil liberty is the direct end of its constitution. Recommending, therefore, to the student in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous Father Paul to his country, "ESTO PERPETUA!"

(z) Montesq. Spirit of Laws xi, 5.

CHAPTER X.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS OR NATIVES.

Having, in the eight preceding chapters, treated of persons as they stand in the public relations of *magistrates,* I now proceed to consider such persons as fall under the denomination of the *people.* And herein all the inferior and subordinate magistrates treated of in the last chapter are included.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominion of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or *ligamen,* which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the

territory he had granted him, and, on the *other hand, that the vassal should be faithful [*367] to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called *fidelitas,* or fealty; and an oath of fealty was required, by the feudal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance;(*a*) except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: *"contra omnes homines fidelitatem fecit."* (*b*) Land held by this exalted species of fealty was called *feudum ligium,* a liege fee; the vassals *homines ligii,* or liege men; and the sovereign their *dominus ligius,* or liege lord. And when sovereign princes did homage to each other, for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure,(*c*) and *liege* homage, which included the fealty before mentioned, and the services consequent upon it. Thus when our Edward III, in

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(*a*) 2 Feud. 5, 6, 7. (*b*) 2 Feud. 99. (*c*) 7 Rep. Calvin's case, 7.

1329, did homage to Philip VI, of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage. (*d*). But with us in England, it becoming a settled principle of tenure that *all* lands in the kingdom are holden of the King as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the King alone. By an easy analogy, the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for *upwards of [*368] six hundred years, (*e*) contained a promise "to be true and faithful to the King and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom." Upon which Sir Matthew Hale (*f*) makes this remark, that it was short and plain, not entangled with long or intricate causes or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But at the revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the pres-

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(*d*) 2 Cart. 401. Mod. Un. Hist. xxiii. 420.

(*e*) Mirror, c 3, § 35. Fleta, 3, 16. Britton, c. 29. 7 Rep. Calvin's case, 6. (*f*) 1 Hal. P. C. 63.

ent form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear *true* allegiance to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the Pope's pretended authority; and the oath of abjuration, introduced in the reign of King William, (*g*) very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traitorous conspiracies against him; and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection. (*h*) And the oath of allegiance may be tendered (*i*) to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county.*

(*g*) Stat. 13 W. III, c. 6. (*h*) Stat. I, Geo. I, c. 13. 6 Geo. III, c. 53. (*i*) 2 Inst. 121. 1 Hal. P. C. 61.

*As regards these oaths great changes have from time to time been made by statute, which it will not be necessary for us to follow here. The subject is now covered by statute 31 and 32 Vic. c. 72, under which no person can be "required or authorized

But, besides these express engagements, the law also holds that there is an implied, original, and vir-
[*369] tual allegiance, *owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the King, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties, of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its perform-

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to take the oaths of allegiance, supremacy and abjuration, or any of such oaths, or any oath substituted for such oaths or any of them," except the persons indicated in that act, in the "Clerical Subscription Act, 1865" (as to which see next chapter), and the "Parliamentary Oaths Act, 1866." The general purpose of the statute 31 and 32 Vic. c. 72, as well as of other statutes which preceded it, was to relieve Roman Catholics and other persons having religious scruples which precluded their taking the oaths formerly required, from the disabilities under which they lay in consequence, and to enable them to serve the state in positions of honor and responsibility in common with their fellow subjects. The oath of allegiance now required is simply that the juror "will be faithful and bear true allegiance to her majesty Queen Victoria, her heirs and successors according to law;" and the oath required of officers generally is, that they will well and truly serve her majesty in their respective offices; while judicial officers are to add to the same a further pledge, that they "will do right to all manner of people after the laws and usages of this balm, without fear or favor, affection or ill will." —Note to Cooley's Blackstone.

ance. (*k*) The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions Sir Edward Coke very justly to observe, (*l*) that "all subjects are equally bounden to their allegiance as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason; but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion.*

Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the King's dominions immediately upon their birth. (*m*) For, immediately upon their birth, they are under the King's protection: at a time, too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstances, nor by any thing but the united concurrence of the legislature. (*n*) An English-

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(*k*) 1 Hal. P. C. 61. (*l*) 2 Inst. 121. (*m*) 7 Rep. 7. (*n*) 2 P. Wms. 124.

man who removes to France, or to China, owes
[*370] the same allegiance *to the King of England there as at home, and twenty years hence as well as now. For it is a principal of universal law, (*o*) that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due.* Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

(*o*) 1 Hal. P. C. 68.

*[And this seems to have guided the courts both of England and America, since the peace between these powers, which ended in the declaration and acknowledgment of the independence of America. It has been determined that the effect of the concurrent acts of the two governments was to divest a natural-born subject of the British king, adhering to the United States of America, of his right to inherit land in England; and so in K. B., it has been determined that the treaty virtually prevented Americans adhering to the crown from inheriting lands in America. See the English case, Doe d. Thomas v. Acklam, 2 B. and C. 779, which cites 7 Wheaton's R. 535.]—Note to Cooley's Blackstone.

Local allegiance is such as is due from an alien or stranger born, for so long time as he continues within the King's dominion and protection: (*p*) and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local, temporary only; and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British empire. From which considerations Sir Matthew Hale (*q*) deduces this consequence, that though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty to *practice any thing against his crown and [*371] dignity; wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defense or aid of the rightful King) have been afterwards punished with death; be-

(*p*) 7 Rep. 6. (*q*) 1 Hal. P. C. 60

cause of the breach of that temporary allegiance, which was due to him as King *de facto*. And upon this footing, after Edward IV recovered the crown, which had been long detained from his house by the line of Lancaster, treasons committed against Henry VI were capitally punished, though Henry had been declared an usurper by parliament.

This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the King, or regal office, but to his natural person and blood-royal; and for the misapplication of their allegiance, viz.: to the regal capacity or crown, exclusive of the person of the King, were the Spencers banished in the reign of Henry II. (*r*) And from hence arose that principle of personal attachment, and affectionate loyalty, which induced our forefathers (and, if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defense and support of their liege lord and sovereign.

This allegiance, then, both express and implied, is the duty of all the King's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the King's ligeance, and can never forfeit by any distance of place or time, but only

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(*r*) 1 Hal. P. C. 67.

by their own misbehavior; the explanation of which rights is the principal subject of the two first books of these Commentaries. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall, however, here endeavour to chalk out some of the principal lines, whereby *they are distinguished from [*372] natives, descending to farther particulars when they come in course.

An alien born may purchase lands, or other estates: but not for his own use, for the King is thereupon entitled to them. (*s*) If an alien could acquire permanent property in lands, he must owe an allegiance, equally permanent with that property, to the King of England, which would probably be inconsistent with that which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void: (*t*) but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons which might be given for our Constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property; for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in

(*s*) Co. Litt. 2. (*t*) Cod. l. 11, tit. 55.

goods, money and other personal estate, or may hire a house for his habitation: (*u*) for personal estate is of a transitory and movable nature; and besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people, only they are subject to certain higher duties at the custom-house; and there are also some obsolete statutes of Hen. VIII prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute, 5 Eliz. c. 7. Also an alien may bring an action concerning personal property, and make a will, and dispose of his personal estate: (*w*) not as it is in France, where the King at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus,* (*x*) unless he has a peculiar exemption. When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no *rights, no privileges, unless [*373] by the King's special favor, during the time of war.

When I say, that an alien is one who is born out of the King's dominions, or allegiance, this also must be understood with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions; so that a particular act of parliament became necessary after the Restoration, (*y*) "for the naturali-

(*u*) 7 Rep. 17. (*w*) Lutw. 34.

(*x*) A word derived from *alibi natus.* Spelm. Gl. 24.

(*y*) Stat. 29 Car. II, c. 6.

zation of children of his majesty's English subjects, born in foreign countries during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the King's ambassadors born abroad were always held to be natural subjects: (*z*) for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son, also, he was held (by a kind of *postliminium*) to be born under the King of England's allegiance, represented by his father the ambassador. To encourage also foreign commerce, it was enacted by statute, 25 Edw. III, st. 2, that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the King, and the mother had passed the seas by her husband's consent, might inherit as if born in England; and accordingly it hath been so adjudged in behalf of merchants. (*a*) But by several more modern statutes (*b*) these restrictions are still farther taken off; so that all children, born out of the King's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural born subjects themselves to all intents and purposes; unless their said ancestors were attained, or banished beyond sea, for high treason; or were at the birth of such children in the service of a

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(*z*) 7 Rep. 18. (*a*) Cro. Car. 601. Mar. 91. Jenk. Cent. 3.
(*b*) 7 Ann. c. 5. 4 Geo. II, c. 21, and 13 Geo. III. c. 21.

prince at enmity with Great Britain. Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be Protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens, born here in England, are, generally speaking, natural-born subjects, and [*374] entitled to all the *privileges of such. In which the constitution of France differs from ours; for there, by their *jus albinatus,* if a child be born of foreign parents, it is an alien. (*c*)†

A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative. (*d*) A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take land by purchase or devise, which an alien may not; but cannot take by inheritance: (*e*) for his parent, through whom he must claim, being an alien, had no inheritable blood; and

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(*c*) Jenk. Cent. 3, cites *Treasure Francois,* 312.

(*d*) 7 Rep. Calvin's case, 25. (*e*) 11 Rep. 67.

*By statute 7 and 8 Vic. c. 66, s. 3, every person born abroad, of a mother who is a natural-born subject of the United Kingdom, is "capable of taking to him, his heirs, executors or administrators, any estate, real or personal, by devise or purchase, or inheritance of succession."—Note to Cooley's Blackstone.

†["In this respect there is not any difference between our laws and those of France. In each country birth confers the right of naturalization." 1 Woodd. 386.]—Note to Cooley's Blackstone.

therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after* may. (*f*) A denizen is not excused (*g*) from paying the alien's duty, and some other mercantile burthens. And no denizen can be of the privy council, or either house of parliament, or have any office or trust, civil or military, or be capable of any grant of lands, &c., from the crown. (*h*)

Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the King's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, &c. (*i*) No bill for naturalization can be received in either house of parliament without such disabling clause in it: (*j*) nor without a clause disabling the person from obtaining any immunity in trade thereby in any foreign country, unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized. (*k*) Neither can any person be naturalized or restored in blood unless he hath received the sacrament of the Lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parlia-

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(*f*) Co. Litt. 8. Vaugh. 285. (*g*) Stat. 22 Hen. VIII, c. 8. (*h*) Stat. 12 W. III, c. 3. (*i*) *Ibid.* (*j*) Stat. 1 Geo. I, c. 4. (*k*) Stat. 14 Geo. III, c. 84.

ment. (*l*) But these provisions have been usually dispensed with by special acts of (*m*) parliament, previous to bills of naturalization of any foreign princes or princesses.*

*These are the principal distinctions between [*375] aliens, denizens, and natives: distinctions, which it hath been frequently endeavoured since the commencement of this century to lay almost totally aside, by one general naturalization act for all foreign Protestants. An attempt which was once carried into execution by the statute, 7 Ann. c. 5; but this, after three years' experience of it, was repealed by the statute, 10 Ann. c. 5, except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. However, every foreign seaman, who in time of war serves two years on board an English ship, by virtue of the King's proclamation, is *ipso facto* naturalized under the like restrictions as in statute 12

(*l*) Stat. 7 Jac. I, c. 2. (*m*) Stat. 4 Ann. c. 1. 7 Geo. II, c. 3. 9 Geo. II, c. 24. 4 Geo. III, c. 4.

*[And now an alien is enabled, on complying with the provisions of the recent statute 7 and 8 Vic. c. 66, to obtain from a principal secretary of state a certificate of naturalization, conferring upon him all the rights and capacities of a natural-born British subject, except the capacity of being a member of the privy council, or of either house of parliament, and such rights and capacities, if any, as may be specially excepted in the certificate. By the same statute it is moreover enacted that any woman married or who shall be married to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and shall have all the rights and privileges of a natural-born subject.]—Note to Cooley's Blackstone.

Wm. III, c. 2; (*n*) and all foreign Protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign Protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the King's dominions for more than one year, and none of them falling within the incapacities declared by statute, 4 Geo. II, c. 21, shall be, (upon taking the oaths of allegiance and abjuration, or in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, &c., from the crown within the kingdoms of Great Britain or Ireland, (*o*) They therefore are admissible to all other privileges, which Protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to Jews (*p*) in particular, was the subject of very high debates about the time of the famous Jew-bill; (*q*) which enables all Jews to prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by statute, 7 Jac. I. It is not my intention to revive this controversy again; for the act lived only a few months, and was then repealed: (*r*) therefore peace be now to its *manes*.

(*n*) Stat. 12 Geo. II, c. 3. (*o*) Stat. 12 Geo. II, c. 7. 20 Geo. III, c. 44. 22 Geo. II, c. 45. 2 Geo. III, c. 25. 13 Geo. III, c. 25. (*p*) A pretty accurate account of the Jews till their banishment in 8 Edward I, may be found in Prynne's *Demurrer*, and in Molloy *de jure Maritime*, b. 3, c. 6. (*q*) Stat. 26 Geo. II, c. 26. (*r*) Stat. 27 Geo. II, c. 1.

CHAPTER XII.

OF THE CIVIL STATE.

The lay part of his majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

That part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men from the highest nobleman to the meanest peasant, that are not included under either our former division, of clergy, or under one of the two latter, the military and maritime states: and it may sometimes include individuals of the other three orders; since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain or lords temporal, as forming, together with the bishops, one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honour.

All degrees of nobility and honour are derived from the King as their fountain: (*a*) and he may institute what new titles he pleases. Hence it is that all degrees

(*a*) 4 Inst. 363.

of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts and barons. (*b*)

*1. A *duke,* though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family. (*c*) Among the Saxons, the Latin name of dukes, *duces,* is very frequent, and signified, as among the Romans, the commanders or leaders of their armies; (*d*) and in the laws of Henry I, as translated by Lambard, we find them called *heretochii.* But after the Norman conquest, which changed the military polity of the nation, the kings themselves continuing for many generations *dukes* of Normandy, they would not honour any subjects with the title of duke, till the time of Edward III, who claiming to be King of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, Edward the Black Prince, duke of Cornwall: and many, of the royal family especially, were afterwards raised to the like honour. However, in the reign of Queen Elizabeth, A. D. 1572, (*e*) the whole order became utterly extinct; but [*397]

(*b*) For original of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *Titles of Honour.* (*c*) Camden, Britan. *tit. Ordines.* (*d*) This is apparently derived from the same root as the German *hertzogen,* the ancient appellation of dukes in that country. Seld. tit. Hon. 2, 1, 12.

(*e*) Camden, Britan. *tit. Ordines.* Spelman, *Gloss.* 191.

it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honors, in the person of George Villers, duke of Buckingham.

2. A *marquess, marchio,* is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom; which were called the marches, from the Teutonic word, *marche,* a limit: such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons who had command there were called lords marchers, or marquesses, whose authority was abolished by statute, 27 Hen. VIII, c. 27, though the title had long before been made a mere ensign of honour; Robert Vere, earl of Oxford, being created marquess of Dublin by Richard II, in the eighth year of his reign. (*f*)

*3. An *earl* is a title of nobility so ancient, [*398] that its original cannot clearly be traced out.

Thus much seems tolerably certain; that among the Saxons they were called *ealdormen, quasi* elder men, signifying the same as *senior* or *senator* among the Romans; and also *schiremen,* because they had each of them the civil government of a several division or shire. On the irruption of the Danes, they changed the name to *eorles,* which according to Camden, (*g*) signified the same in their language. In Latin they are called *comites* (a title first used in the empire) from being the

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(*f*) 2 Inst. 5. (*g*) Britan. *tit. Ordines.*

King's attendants: "*a societate nomen sumpserunt, reges enim tales sibi associant.*" (*h*) After the Norman conquest, they were for some time called *counts* or *countees,* from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes.* In writs and commissions, and other formal instruments, the King, when he mentions any peer of the degree of an earl, usually styles him "trusty and well-beloved *cousin,*" an appellation as ancient as the reign of Henry IV, who being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connection in all his letters and other public acts; from whence the usage has descended to his successors, though the reason has long ago failed.

4. The name of *vice-comes* or *viscount,* was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry the Sixth; when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of Viscount Beaumont, which was the first instance of the kind. (*i*)

5. A *baron's* is the most general and universal title

(*h*) Bracton, *l.* 1, c. 8. Flet. *l.* 1, c. 5. (*i*) 2 Inst. 5.

of nobility; for originally every one of the peers [*399] of superior rank *had also a barony annexed to his other titles. (*k*) But it hath sometimes happened that, when an ancient baron hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony; and there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours; so that now the rule doth not hold universally, that all peers are barons. The original and antiquity of baronies has occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron (which is the lord's court, and incident to every manor,) gives some countenance. It may be collected from King John's *magna carta,* (*l*) that originally all lords of manors, or barons, that held of the king *in capite,* had seats in the great council or parliament; till about the reign of that prince the conflux of them became so large and troublesome, that the King was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and, as it is said, to sit by representation in another house; which gave rise to the separation of the two houses of parlia-

(*k*) 2 Inst. 5, 6. (*l*) Cap. 14.

ment. (*m*) By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard the Second first made it a mere title of honour, by conferring it on divers persons by his letters patent. (*n*).

Having made this short inquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were, in right of those estates, allowed to be *peers of the realm, and were summoned to parliament [*400] to do suit and service to their sovereign; and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands; (*o*) and thus, in 11 Hen. VI, the possession of the castle of Arundel was adjudged to confer an earldom on its possessor. (*p*) But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ

(*m*) Gilb. Hist. of Exch. c. 3. Seld. Tit. of Hon. 2, 5, 21.
(*n*) 1 Inst. 9. Seld. *Jan. Angl.* 2, § 66.
(*o*) Glan. 1, 7, c. 1. (*p*) Seld. Tit. of Hon. b. 2, c. 9, § 5.

of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

Peers are now created either by writ, or by patent: for those who claim by prescription must suppose either a writ or patent made to their ancestors; though by length of time it is lost. The creation by writ, or the King's letter, is a summons to attend the house of peers, by the style and title of that barony, which the King is pleased to confer; that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually take his seat in the house of lords; and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony: (*q*) and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs, according to the limitations thereof, though he never himself makes use of it. (*r*) Yet it is frequent to call up the eldest son of a peer to the house of lords by writ of summons in the name of his father's barony; because in that case there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather. Creation by writ has also one advantage over that by patent: for a person created by writ holds the dignity to him *and his *heirs*, without any words to that [*401] purport in the writ; but in letters patent there must be words to direct the inheritance, else the

(*q*) Whitlocks of Parl. ch. 144. (*r*) Co. Litt. 16.

dignity enures only to the grantee for life. (*s*) For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as, where a peerage is limited to a man, and the heirs male of his body by Elizabeth, his present lady, and not to such heirs by any former or future wife.

Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered. And first we must observe, that in criminal cases a nobleman shall be tried by his peers. The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would, moreover, be deprived of the privilege of the meanest subject, that of being tried by their equals, which is secured to all the realm, by *magna carta,* c. 29. It is said, that this does not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies, which they hold *jure ecclesiæ,* yet are not ennobled in blood, and consequently not peers with the nobility. (*t*) As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor, duchess of Gloucester, wife to the lord protector, was accused of treason, and found guilty of witchcraft, in ecclesiastical synod through the intrigues of Cardinal Beaufort.

(*s*) Co. Litt. 9, 16. (*t*) 3 Inst. 30, 31.

This very extraordinary trial gave occasion to a special statute, 20 Hen. VI, c. 9, which declares (*u*) the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers: but, if she be only noble by marriage, then, by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost. (*v*) Yet if a duchess dowager marries a baron, she continues a duchess still; for [*402] all the *nobility are *pares,* and therefore it is no degradation. (*w*) A peer, or peeress, either in her own right or by marriage, cannot be arrested in civil cases: (*x*) and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer, sitting in judgment gives not his verdict upon oath, like an ordinary juryman, but upon his honour: (*y*) he answers also to bills in chancery upon his honour, and not upon his oath; (*z*) but, when he is examined as a witness either in civil or criminal cases, he must be sworn: (*a*) for the respect which the law shows to the honour of a peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis.* (*b*) The honour of peers is, however, so

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(*u*) Moor, 769. 2 Inst. 60. 6 Rep. 52 Staundf. P. C. 152. (*v*) Dyer, 79. Co. Litt. 16. (*w*) 2 Inst. 50. (*x*) Finch. *l.* 355. 1 Ventr. 298. (*y*) 2 Inst. 49. (*z*) 1 P. Wms. 146. (*a*) Salk. 512. (*b*) Cro. Car. 64.

highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum,* and subjected to peculiar punishments by divers ancient statutes. (*c*)

A peer cannot lose his nobility, but by death or attainder, though there was an instance in the reign of Edward the Fourth, of the degradation of George Nevile, duke of Bedford, by act of parliament, (*d*) on account of his poverty, which rendered him unable to support his dignity. (*e*) But this is a singular instance, which serves at the same time, by having happened, to shew the power of parliament; and by having happened but once, to shew how tender the parliament hath been in exerting so high a power. It hath been said, indeed, (*f*) that if a baron wastes his estate so that he is not able to support the degree, the *King* may degrade him: but it is expressly held by later authorities, (*g*) that a peer cannot be degraded but by act of *parliament.*

(*c*) Edw. I, c. 34. 2 Ric. II, st. 1, c. 5. 12 Ric. II, c. 11. (*d*) 4 Inst. 355. (*e*) The preamble to the act is remarkable: "Forasmuch as oftentimes it is seen, that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it induceth great poverty and indigence, and causeth oftentimes great extortion, embracery, and maintenance to be had, to the great trouble of all such countries where such estate shall happen to be: therefore," etc. (*f*) Moor. 678. (*g*) 12 Rep. 107. 12 Mod. 56.

*The commonalty, like the nobility, are di-
[*403] vided into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility. (*h*)

The first name of dignity, next beneath a peer, was anciently that of *vidames, vice-domini,* or *valvasors*: (*i*) who are mentioned by our ancient lawyers (*j*) as *viri magnæ dignitatis*: and Sir Edward Coke (*k*) speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their original or ancient office.

Now, therefore, the first personal dignity, after the nobility, is a *knight* of the order of St. George, or *of the garter;* first instituted by Edward III, A. D. 1344. (*l*) Next, (but not till after certain *official* dignities, as privy-counsellors, the chancellors of the exchequer and duchy of Lancaster, the chief justice of the King's bench, the master of the rolls, and the other English judges,) follows a *knight banneret;* who indeed by statutes, 5 Ric. II, st. 2, c. 4, and 14 Ric. II, c. 11, is ranked next after barons: and his precedence before the younger sons of viscounts was confirmed to him by order of King James I, in the tenth year of his reign. (*m*) But, in order to entitle himself to this rank, he must have been created by the King in person, in the field,

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(*h*) 2 Inst. 29. (*i*) Camden, *Britan. t. Ordines.* (*j*) Bracton, *l.* 1, c. 8. (*k*) 2 Inst. 667. (*l*) Seld. Tit. of Hon. 2, 5, 41. (*m*) *Ibid.* 2, 11, 3.

under the royal banners, in time of open war. (*n*) Else he ranks after *baronets,* who are the next order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by King James the First, A. D. 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland; for which reason all baronets have the arms of Ulster superadded to their family coat. Next follow *knights of the bath;* an order instituted by King Henry IV, *and revived by King George the First. They are so called [*404] from the ceremony of bathing the knight before their creation. The last of these inferior nobility are *knights bachelors;* the most ancient though the lowest, order of knighthood amongst us: for we have an instance (*o*) of King Alfred's conferring this order on his son Athelstan. The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community. (*p*) Hence, some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati*: *aurati,* from the gilt spurs they wore; and *equites,* because they always served on horseback: for it is observable, (*q*) that almost all nations

(*n*) 4 Inst. 6. (*o*) Will. Malmsb. *lib.* 2. (*p*) Tac. *de Morib. Germ.* 13. (*q*) Camd. *ibid.* Co. Litt. 74.

call their knights by some appellation derived from an horse. They are also called in our law *milites,* because they formed a part of the royal army, in virtue of their feudal tenures; one condition of which was, that every one who held a knight's fee immediately under the crown, which in Edward the Second's time (*r*) amounted to 20*l. per annum,* was obliged to be knighted, and attend the King in his wars, or fine for his non-compliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles the First, gave great offence; though warranted by law, and the recent example of Queen Elizabeth; but it was, by the statute, 16 Car. I, c. 16, abolished; and this kind of knighthood has, since that time, fallen into great disregard.

These, Sir Edward Coke says, (*s*) are all the names of *dignity* in this kingdom, esquires and gentle-
[*405] men being only names of *worship.* But before these last (*t*) the heralds rank all *colonels, sergeants at law, and doctors in the three learned professions.

(*r*) Stat. *de Milit.* 1 Edw. II. (*s*) 2 Inst. 667.

(*t*) The rules of precedence in England may be reduced to the following table: in which those marked * are entitled to the rank here allotted them, by statute 31 Hen. VIII, c. 10; marked †, by statute 1 W. and M. c. 21; marked ||, by letters patent, 9, 10, and 14 Jac. 1, which see in Seld. Tit. of Hon. ii. 5, 46, and ii. 11, 3; marked ‡, by ancient usage and established custom; for which see, among others, Camden's Britannia, *Tit. Ordines.* Milles's Catalogue of Honour, *edit.* 1610; and Chamberlayne's Present State of England, b. 3, ch. 3.

TABLE OF PRECEDENCE.

* The king's children and grandchildren.
* ——— brethren.
* ——— uncles.
* ——— nephews.
* Archbishop of Canterbury
* Lord Chancellor or Keeper, if a baron.
* Archbishop of York.
* Lord Treasurer.
* Lord President of the Council,
* Lord Privy Seal,
} if barons.
* Lord Great Chamberlain. But see private stat. 1 Geo. I, c. 3.
* Lord High Constable.
* Lord Marshal.
* Lord Admiral.
* Lord Steward of the household.
* Lord Chamberlain of the household.
} above all peers of their own degree.
* Dukes.
* Marquesses.
‡ Dukes' eldest sons.
* Earls.
‡ Marquesses' eldest sons.
‡ Dukes' younger sons.
* Viscounts.
‡ Earls' eldest sons.
‡ Marquesses' younger sons.
* Secretary of State, if a bishop.
* Bishop of London.
* ——— Durham.
* ——— Winchester.
* Bishops.
* Secretary of State, if a baron.
* Barons.
† Speaker of the House of Commons.
† Lords Commissioners of the Great Seal.
‡ Viscounts' eldest sons.
‡ Earls' younger sons.
‡ Barons' eldest sons.
|| Knights of the Garter.
|| Privy Counsellors.
|| Chancellor of the Exchequer.
|| Chancellor of the Duchy.
|| Chief Justice of the King's Bench.
|| Master of the Rolls.
|| Chief Justice of the Common Pleas.
|| Chief Baron of the Exchequer.
|| Judges, and Barons of the Coif.
|| Knights Bannerets, royal.
|| Viscounts' younger sons.
|| Barons' younger sons.
|| Baronets.
|| Knights Bannerets.
‡ Knights of the Bath.

‡ Knights Bachelors.	‡ Doctors.
|| Baronets' eldest sons.	‡ Esquires.
|| Knights' eldest sons.	‡ Gentlemen.
|| Baronets' younger sons.	‡ Yeomen.
|| Knights' younger sons.	‡ Tradesmen.
‡ Colonels.	‡ Artificers.
‡ Sergeants-at-law.	‡ Laborers.

N. B.—Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional or official; and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

*Esquires and gentlemen are confounded together by Sir Edward Coke, who observes, (*u*) [*406] that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit,* who bears coat armour, the grant of which adds gentility to a man's family: in like manner as civil nobility, among the Romans, was founded in the *jus imaginum,* or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire;* for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them: (*v*) 1. The eldest sons of knights, and their eldest sons in perpetual succession: (*w*) 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession: both which

(*u*) 2 Inst. 668. (*v*) 2 Inst. 668. (*w*) 2 Inst. 667.

species of esquires Sir Henry Spelman entitles *armigeri natalitii.* (*x*) 3. Esquires created by the King's letters patent, or other investiture; and their eldest sons. 4. Esquires by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown. To these may be added, the esquires of knights of the Bath, each of whom constitutes three at his installation; and all foreign, nay, Irish peers; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings. (*y*) As for *gentlemen,* says Sir Thomas Smith, (*z*) they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labor, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. A *yeoman* is he that hath free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the *shire, and do any other act, where the law requires one that is *probus et legalis homo.* (*a*) [*407]

The rest of the commonalty are *tradesmen, artificers,* and *labourers;* who, as well as all others, must in pursuance of the statute, 1 Hen. V, c. 5, be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they

(*x*) Gloss. 43. (*y*) 3 Inst. 30. 2 Inst. 667. (*z*) Commonw. of Eng. b. 1 c. 20. (*a*) 2 Inst. 668.

have been conversant, in all original writs of actions personal, appeals, and indictments, upon which process of outlawry may be awarded; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process.

COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE SECOND.*

OF THE RIGHTS OF THINGS.

CHAPTER I.

OF PROPERTY, IN GENERAL.

The former book of these Commentaries having treated at large of the *jura personarum,* or such rights and duties as are annexed to the *persons* of men, the objects of our inquiry in this second book will be the *jura rerum,* or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

*There is nothing which so generally strikes the [*2] imagination, and engages the affections of man-

* This is Volume or Book II of Blackstone's Commentaries, from which chapters of interest to American students are selected.

kind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right.

Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them.

But, when law is to be considered not only as a matter

of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth *upon the earth.(*a*) This is [*3] the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit

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(*a*) Gen. i, 28.

either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein *"erant omnia communia et indivisa omnibus, veluti unum cunctus patrimonium esset."* (*b*) Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: (*c*) or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have [*4] driven him by force; but the instant that he *quitted the use or occupation of it, another might seize it, without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre,

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(*b*) Justin. l. 43, c. 1.

(*c*) Barbeyr. Puff. l. 4, c. 4.

which is common to the public, and yet the place which any man has taken is for the time his own.(*d*)

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the

(*d*) *Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occuparit. De Fin. l.* 3, *c.* 20.

field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall; which [*5] seem to have been originally mere *temporary huts or movable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil; partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds in

order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well."(*e*) And Isaac, *about [*6] ninety years afterwards, reclaimed this his father's property; and after much contention with the Philistines, was suffered to enjoy it in peace. (*f*)

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighborhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This

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(*e*) Gen. xxi, 30. (*f*) Gen. xxvi, 15, 18, &c.

practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman empire. (*g*) We have also a striking example of the same kind in the history of Abraham and his nephew Lot. (*h*) When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavored to compose: "Let there be no strife I pray thee between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered everywhere, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan."

(*g*) *Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit. De mor. Ger.* 16.

(*h*) Gen. c. xiii.

*Upon the same principle was founded the [*7] right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert, uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenseless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in color; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been

received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not therefore a separate property in lands, as well as movables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature.

[*8] *Whereas now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural.* Necessity begat property: and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants: states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labor, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, how this property became actually vested: or what it is that gave a man an exclusive right to retain in a permanent manner that specific *land* which before belonged generally to everybody, but particularly to nobody. And, as we be-

fore observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the *substance* of the earth itself: which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is found on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labor, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savors too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued *use such spots of [*9] ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some

other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So, if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove. (*i*)

But this method of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus

(*i*) See book I, page 295.

mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant or conveyance: which *may be considered either [*10] as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property: the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property: and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

The most universal and effectual way of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a mil-

lion of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of [*11] it, or is not permitted to make any disposition *at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion. (*k*) And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those

(*k*) It is principally to prevent any vacancy of possession, that the civil law considers father and son as one person; so that upon the death of either, the inheritance does not so properly descend, as continue in the hands of the survivor. *Ff.* 28, 2, 11.

who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural,* but merely a *civil,* right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him on his *death-bed, and are the earliest witnesses of his [*12] decease. They become therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And

therefore also in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For, we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir." (*l*)

While property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long and indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament;* that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we therefore emphatically style his *will.* This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his movables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth; and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present.

(*l*) Gen. xv, 3.

Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does any thing vary more than the right of inheritance under different *national establishments. [*13] In England, particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be their immediate heir, by any the remotest possibility: in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead, that, if a will of lands be attested by

only *two* witnesses, instead of *three,* which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands: or, as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas, the law of nature suggests, that, on the death of the possessor, the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall, by will, attended with certain requisites, appoint; and, in defect of such [*14] appointment, to go to some particular person, who, from the result *of certain local constitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed; and, where the necessary requisites are omitted, the right of the heir is equally strong, and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary prop-

erty is capable of being had; and, therefore, they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such, also, are the generality of those animals which are said to be *ferœ naturæ,* or of a wild and untameable disposition; which any man may seize upon and keep for his own use or pleasure. All these things, so long as they may remain in possession, every man has a right to enjoy without disturbance; but, if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again; there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such, also, are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels *would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely [*15]

cut up the root of dissension by vesting the things themselves in the sovereign of the state; or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim of assigning to every thing capable of ownership a legal and determinate owner.

CHAPTER II.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

The objects of dominion or property are *things,* as contradistinguished from *persons:* and things are, by the law of England, distributed into two kinds; things *real* and things *personal.* Things *real* are such as are permanent, fixed and immovable, which cannot be carried out of their place; as lands and tenements: things *personal* are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go.

In treating of things *real,* let us consider, *first,* their several *sorts* or kinds; *secondly,* the *tenures* by which they may be holden; *thirdly,* the *estates* which may be had in them; and *fourthly,* the *title* to them, and the *manner* of *acquiring* and *losing* it.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements or hereditaments. *Land* comprehends all things of a permanent substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though, in its vulgar *acceptation, it is only [*17] applied to houses and other buildings, yet, in its original, proper and legal sense, it signifies every thing

that may be *holden,* provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus, *liberum tenementum,* frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like: (*a*) and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. (*b*) But an *hereditament,* says Sir Edward Coke, (*c*) is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited,* be it corporeal or incorporeal, real, personal or mixed. Thus, an heir-loom, or implement of furniture which, by custom, descends to the heir, together with a house, is neither land nor tenement, but a mere movable; yet being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament. (*d*)

Hereditaments, then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

(*a*) Co. Litt. 6.
(*b*) *Ibid.* 19, 20.
(*c*) 1 Inst. 6.
(*d*) 3 Rep. 2.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land,* says Sir Edward Coke, (*e*) comprehendeth, in its legal signification, any ground, soil or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes and heath. *It legally includeth, [*18] also, all castles, houses and other buildings: for they consist, saith he, of two things: *land,* which is the foundation, and *structure* thereupon; so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water.* (*f*) For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's I have no right to reclaim it. But the land which that water covers is permanent, fixed and immovable; and

(*e*) 1 Inst. 4. (*f*) Brownl. 142.

therefore, in this, I may have a certain substantial property; of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum,* is the maxim of the law; upwards, therefore no man may erect any building, or the like to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of [*19] the things are *equally sufficient to pass them, except in the instance of water; by a grant of which nothing passes but a right of fishing: (*g*) but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum,* every thing terrestrial will pass. (*h*)

(*g*) Co. Litt. 4.

(*h*) Co. Litt. 4, 5, 6.

CHAPTER III.

OF INCORPOREAL HEREDITAMENTS.

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. (*a*) It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament; for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a men-

(*a*) *Ibid.* 19, 20.

tal existence, and cannot be delivered over from
[*21] hand to hand. So tithes, if we consider the *produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments; for they being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense; that casual share of the annual increase is not, till severed, capable of being shewn to the eye, nor of being delivered into bodily possession.

Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents. . . . . (*)

III. Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like. (*b*) And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

1. Common of *pasture* is a right of feeding one's beasts on another's land: for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of com-

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(*) I, *Advowsons* and II, *tithes*, are omitted as they are of no importance to students of American Law, having no place in our jurisprudence.

(*b*) Finch, Law, 157.

mon is either appendant, appurtenant, because of vicinage, or in gross. (*c*)

*Common *appendant* is a right belonging to [*33] the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons, within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter of most universal right; and it was originally permitted, (*d*) not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of the lands; and this was the original of common appendant; which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England. (*e*) Common *appurtenant,* ariseth from no connection of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships, (*f*) or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This not aris-

(*c*) Co. Litt. 122. (*d*) 2 Inst. 86.
(*e*) Stiernh. *de jure Sueonum, l.* 2, c. 6.
(*f*) Cro. Car. 482. 1 Jon. 397.

ing from any natural propriety or necessity, like common appendant, is therefore not of general right; but can only be claimed by immemorial usage and prescription, (*g*) which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage,* or neighborhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. Neither hath any per-
[*34] son of one town a right to put his beasts originally *into the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass. (*h*) Common *in gross,* or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

All these species of pasturable common may be and usually are limited as to number and time; but there are

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(*g*) Co. Litt. 121, 122. (*h*) *Ibid.* 122.

also commons *without stint,* and which last all the year. By the statute of Merton, however, and other subsequent statutes, (*i*) the lord of a manor may enclose so much of the waste as he pleases for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law *"approving,"* an ancient expression signifying the same as "improving." (*k*) The lord hath the sole interest in the soil; but the interest of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage. (*l*)

2, 3. Common of *piscary* is a liberty of fishing in another man's water; (*) as common of *turbary* is a liberty

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(*i*) 20 Hen. III, c. 4. 29 Geo. II, c. 36, and 31 Geo. II, c. 41.
(*k*) 2 Inst. 474. (*l*) 9 Rep. 113.

(*) In tide waters the right of taking fish is common to all citizens: Parker v. Cutler Mill Dam Co., 7 Shep. 353; Coolidge v. Williams, 4 Mass. 140; Burnham v. Webster, 5 *id.* 266; but the town within whose bounds the waters are may have an exclusive right by grant from the state. Coolidge v. Williams, 4 Mass. 140. And it seems that a right to a several fishery in an arm of the sea may be acquired by prescription, though uninterrupted exercise and use alone would not establish it, however long continued, since the person so using it only exercises a right which, *prima facie,* he possesses in common with all others. It must further appear that all others have been excluded. Chalker v. Dickinson, 1 Conn. 382. And every presumption will be against the right. Gould v. James, 6 Cow.

of digging turf upon another's ground. (*m*) There is also a common of digging for coals, minerals, stones and the like. All these bear a resemblance to common of pasture in many respects: though in one point they go much further; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

[*35] *4. Common of estovers or *estouviers,* that is, *necessaries* (from *estoffer,* to furnish,) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon wood, *bote,* is used by us as synonymous to the French *estovers:* and therefore house bote is a sufficient allowance of wood, to repair, or to burn in the house: which

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369; and see Collins v. Benbury, 5 Ired. 118; Cobb v. Davenport, 3 Vroom. 369.

In rivers where the tide does not ebb and flow, the proprietor of the bank has an exclusive right of fishery to the thread of the stream: People v. Platt, 17 Johns. 209; Waters v. Lilley, 4 Pick. 145; Adams v. Pease, 2 Conn. 481; Beckman v. Kreamer, 43 Ill. 447; but the state may regulate its existence with a view to the protection of the rights of all others having a like right. Commonwealth v. Chapin, 5 Pick. 199; Ingram v. Threadgill, 3 Dev. 59; Vinton v. Welsh, 9 Pick. 87.

It has been held that in those large rivers, like the Susquehanna, which are navigable by sea-going vessels, there is no exclusive right of fishery in the adjoining owners, but the right is in the public at large. Shrunk v. Schuylkill Nav. Co., 14 S. and R. 71.—*Note to Cooley's Blackstone.*

(*m*) Co. Litt. 122.

latter is sometimes called fire-bote: plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hay, hedges or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. (*n*)

These several species of commons do all originally result from the same necessity as common of pasture; viz.: for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. A fourth species of incorporeal hereditaments is that of *ways;* or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; (*) but of private

(*n*) Co. Litt. 41.

(*) Ways are either public or private. A public way is established either by the *dedication* of the owner of the land, or by an appropriation of the land for the purpose, by the sovereign authority, under what is called the right of *eminent domain.* When this right is exercised, it must be in pursuance of some express legislative authority which prescribes the formalities, and compensation must be made to the owner. The constitutions of the United States and of the several states contain

ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission; as when the

declarations that private property shall not be taken for public use without compensation made therefor, but these are only declaratory of the pre-existing principle. Dedication of a way is an appropriation of land to that use by the owner thereof, and requires for its perfection an acceptance by the public. The dedication can only be made by the owner of the fee: Wood v. Veal, 5 B. and Ald. 454; and therefore where land is under lease, the fact that the public are permitted to make use of a way across it will not be evidence of a dedication, unless there be circumstances from which the knowledge and concurrence of the owner of the reversion can be implied. Rex v. Barr, 4 Camp. 16; Davies v. Stephens, 7 C. and P. 570. No writing is required to establish a dedication, and no particular formality. The mere throwing open the land to the use of the public for a way constitutes *ipso facto* and instantaneously a dedication, if the public accepts it. Hunter v. Trustees of Sandy Hill, 6 Hill, 407. The intent to dedicate, however, must be unequivocal; it will not be implied from any acts of an ambiguous character. The fact that the owner acquiesced in the use and enjoyment of the way by the public for twenty years would be sufficient evidence of such intent in any case: Smith v. State, 3 Zab. 130; State v. Marble, 4 Ired. 318; but it might also be inferred from an uninterrupted use for a much less time. The question is one of fact, to be passed upon by jury. See Angell and Durfee on Highways, c. 3; Hobbs v. Lowell, 19 Pick. 405; Pritchard v. Atkinson, 4 N. H. 1; Stacy v. Miller, 4 Mo. 478; Morrison v. Marquardt, 24 Iowa, 35; Noyes v. Ward, 19 Conn. 250. A common mode, by which a party who temporarily allows the public to pass over his land negatives an intent to dedicate, is by fencing up the passage one day in the year, or doing some other unequivocal act in assertion of his paramount right. Cook v. Hillsdale, 7 Mich. 115. Acceptance by the public may either be by some formal resolution or other action by the

owner of the land *grants* to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone: it dies with the person; and, if the grantee leaves the country he cannot assign over

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proper authorities, or it may be inferred from circumstances. The mere fact that any number of individuals pass through a passage left open to them does not constitute an acceptance, but if the proper highway authorities treat it as a public way, either by expending public moneys upon it, or by setting it off into some road district for supervision and repair, they thereby accept it. See Kelly's Case, 8 Grat. 632; Hobbs v. Lowell, 19 Pick. 405; Wright v. Tukey, 3 Cush. 290; People v. Jones, 6 Mich. 176. And long continued user by the public is important evidence bearing on the question of dedication, and may in some cases be sufficient to warrant its being found. See Angell and Durfee on highways, § 161, and cases cited. A dedication may be of a part of a road only, as well as of the whole of it. Valentine v. Boston, 22 Pick. 75.

Ways are also often dedicated by laying out plats upon which streets and roads are marked, and selling lots in reference thereto. There are statutes in the several states which prescribe the effect of such plats, when duly acknowledged and recorded. If, however, the plat is not so executed as to comply with the statute, it will still be regarded, when acted upon, as an offer to the public of the streets marked upon it, and they become public ways when accepted as in other cases. And if there be no act of acceptance on the part of the public, there is nevertheless a right in those who have bought lots upon the plat with reference thereto to have all the ways laid down thereon kept open for their use with reference to the enjoyment of their purchases. Matter of Lewis street, 2 Wend. 472; Smyles v. Hastings, 22 N. Y. 217; Smith v. Lock, 18 Mich. 56; see O'Linda v. Lothrop, 21 Pick. 292.—Note to Cooley's Blackstone.

his right to any other; nor can he justify taking [*36] another *person in his company. (*o*) A way may be also by *prescription;* as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law; for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass. (*p*) For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same. (*q*) By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased: which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman. (*r*) (*)

(*o*) Finch, Law, 31. (*p*) *Ibid.* 63. (*q*) Co. Litt. 56.

(*r*) Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon. 297.

(*) This statement is erroneous. He would only have that right where the owner of the land was bound by grant or prescription to repair the way. See Taylor v. Whitehead, Doug. 746. See also the preceding note.—Note to Cooley's Blackstone.

V. Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments; whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators. (*s*) Neither can any *judicial* office be granted in reversion: because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient: but *ministerial* offices may be so granted; (*t*) for those may be executed by deputy. Also, by statute 5 and 6 Edw. VI, c. 16, no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it. For the law presumes that *he who buys an office will, by [*37] bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in a former book; (*u*) it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

(*s*) 9 Rep. 97. (*t*) 11 Rep. 4. (*u*) See book 1, ch. 12.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms; and their definition is (*v*) a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or in some cases may be held by prescription, which as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man or in many; but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant. (*w*)

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount; to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes; to have the cognizance of pleas; which is a still greater liberty, being an exclusive right so that no other court shall try causes arising within that jurisdic-

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(*v*) Finch, L, 164. (*w*) 2 Roll. Abr. 191. Keilw. 196.

tion: to have a bailiwick, or liberty exempt from the sheriff of the county; *wherein the grantee only, and his officers, are to execute all process; to have a fair or market: with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like), else the franchise is illegal and void: (*x*) or lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion. [*38]

As to a *forest;* this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws. (*y*) But a *chase* differs from a park, in that it is not enclosed, and also in that a man may have a chase in another man's ground as well as in his own, being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A *park* is an enclosed chase, extending only over a man's own grounds. The word *park* indeed properly signifies an enclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so. (*z*) Though now the difference between a real park, and such enclosed grounds, is in many

(*x*) 2 Inst. 220. (*y*) 4 Inst. 314.
(*z*) Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.

respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase, (*a*) except such as possess these franchises of forest, chase or park. *Free-warren* is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren; (*b*) which, being *ferœ naturæ,* every one had a natural right to
[*39] kill as he could; but upon *the introduction of the forest laws, at the Norman conquest, as will be shown hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them, by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man, therefore, that has the franchise of warren, is in reality no more than a royal gamekeeper; but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free-warren. (*c*) This franchise is almost fallen into disregard, since the new statutes for

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(*a*) These are properly buck, doe, fox, martin, and roe; but in a common and legal sense extend likewise to all the beasts of the forest; which besides the other, are reckoned to be hart, hind, hare, boar, and wolf and in a word, all wild beasts of venary or hunting. (Co. Litt. 233.)

(*b*) The beasts are hares, conies, and roes; the fowls are either *campestres*, as partridges, rails, and quails; or *sylvestres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons. (Co. Litt. 233.)

(*c*) Salk. 637.

preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in ancient times who have sold their estates, and reserved the free-warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's ground. (*d*) A *free fishery,* or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed; (*e*) though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested. (*f*) This opening was extended by the second (*g*) and third (*h*) charters of Henry III, to those also that were fenced under Richard I; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a *several* fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil, (*i*) which in a free

(*d*) Bro. *Abr.* tit. *Warren,* 3.

(*e*) Seld. *Mar. Claus. I.* 24. Dufresne, V, 503. Crag. *de Jur. feod. II,* 8, 15.

(*f*) *Cap.* 47, *edit. Oxon.*

(*g*) *Cap.* 20.

(*h*) 9 Hen. III, c. 16.

(*i*) *M.* 17 *Edw. IV,* 6 *P.* 18 *Edw. IV,* 4 *T.* 10 *Hen. VII,* 24, 26. *Salk.* 637.

fishery is not requisite. It differs also from a *common* of piscary before mentioned, in that the free fishery is an *exclusive right, the common of piscary is not so: and therefore, in a free fishery a man has a property in the fish before they are caught, in a common of piscary not till afterwards. (*k*) Some indeed have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor. (*l*) But to consider such right as originally a flower of the prerogative, till restrained by *Magna Charta,* and derived by royal grant (previous to the reign of Richard I) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities (*m*) which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

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VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance. (*n*) In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money

(*k*) F. N. B. 88. Salk. 637. (*l*) 2 Sid. 8.

(*m*) See them well digested in Hargrave's notes on Co. Litt. 122. (*n*) Finch, L. 162.

is sometimes substituted. (*o*) And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. Annuities, which are much of the same nature; only that these arise from temporal, as the former from spiritual persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of *lands,* whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. (*p*) Therefore, if a man by deed grant to another the sum of 20*l. per annum,* without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity; which is of so little account in the law, that if granted to an eleemosynary corporation, it is not within the statutes of mortmain; (*q*) and yet a man may have a real estate in it, though his security is merely personal.

*X. Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus,* [*41] signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. (*r*) It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit;* yet there is no occasion

(*o*) See book 1, ch. 8.
(*p*) Co. Litt. 144.
(*q*) *Ibid.* 2.
(*r*) *Ibid.* 144.

for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent. (*s*) It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits. This profit must also be *certain;* or that which may be reduced to a certainty by either party. It must also issue *yearly;* though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year; (*t*) yet, as it is to be produced out of the profits of lands and tenements, as recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted. (*u*) It must, lastly, issue out of *lands and tenements corporeal;* that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrein. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. (*w*) But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt: (*x*) though it doth not affect the inheritance, and is no legal rent in contemplation of law.

(*s*) *Ibid.* 142. (*t*) *Ibid.* 47. (*u*) Plowd. 13. 8 Rep. 71.
(*w*) Co. Litt. 144. (*x*) *Ibid.* 47.

There are at common law (*y*) three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called *because it hath some [*42] corporeal service incident to it, as at the least fealty or the feudal oath of fidelity. (*z*) For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shilling rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrein of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. (*a*) A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land: as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrein for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-*charge,* because in this manner the land is charged with a distress for the payment of it. (*b*) *Rent-seck, reditus siccus,* or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

(*y*) Litt. § 213.
(*z*) Co. Litt. 142.
(*a*) Litt. § 215.
(*b*) Co. Litt. 143.

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor, (*c*) which cannot be departed from or varied. Those of the freeholders are frequently called *chief*-rents, *reditus capitales:* and both sorts are indifferently denominated *quit*-rents, *quieti reditus:* because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called *white*-rents, or *blanch-farms, reditus albi;* (*d*) in contradistinction to rents reserved in work, grain, or baser money, [*43] which were called **reditus nigri,* or *black-mail.* (*e*) *Rack*-rent is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation: (*f*) for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual methods for life or years.

These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assize, and chief-rents, as in case of rents reserved upon lease. (*g*)

(*c*) 2 Inst. 19.

(*d*) In Scotland this kind of small payment is called *blanch-holding*, or *reditus albæ firmæ*. (*e*) 2 Inst. 19.

(*f*) Co. Litt. 143. (*g*) Stat. 4 Geo. II, c. 28.

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation: (*h*) but in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country. (*i*) And strictly the rent is demandable and payable before the time of sunset of the day whereon it is reserved; (*k*) though perhaps not absolutely due till midnight. (*l*)

With regard to the original of rents, something will be said in the next chapter; and, as to distresses and other remedies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our Commentaries, which will treat of civil injuries, and the means whereby they are redressed.

(*h*) Co. Litt. 201.

(*i*) 4 Rep. 73.

(*k*) Co. Litt. 302. 1 Anders. 253.

(*l*) 1 Saund. 287. Prec. Chanc. 555. Salk. 578.

CHAPTER V.*

OF THE ANCIENT ENGLISH TENURES.

In this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments might have been holden, as the same stood in force, till the middle of the last century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles and no other; being fruits of, and deduced from, the feudal policy.

Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement,* the possessors thereof, *tenants,* and the manner of their possession a *tenure.* Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the lord *paramount,* or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior per-

*Chapter IV, "Of the Feudal System," is omitted, for the reason that it is of no importance in modern law, and its main features are given elsewhere in the Cyclopedia of Law.—Ed.

sons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king:† and, thus partaking of a middle nature, were called *mesne,* or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was said to hold *of A, [*60] and A of the king; or, in other words, B held his lands immediately of A, but mediately of the king. The king therefore was styled lord paramount; A was both tenant and lord, or was a mesne lord: and B was called tenant *paravail,* or the lowest tenant; being he who was supposed to make avail, or profit of the land. (*a*) In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke, (*b*) in the law of England we have not properly *allodium;* which we have seen, (*c*) is the name by which the feudists abroad distinguish such estates of the subject as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under

† [William the First, and other feudal sovereigns, though they made large and numerous grants of lands, always reserved a rent, or certain annual payments (commonly very trifling), which were collected by the sheriffs of the counties in which the lands lay, to show that they still retained the *dominium directum* in themselves. Madox Hist. Exch. c. 10; Craig. de Feud, l. 1, c. 9.]—Note Cooley's Blackstone.

(*a*) 2 Inst. 296. (*b*) 1 Inst. 1. (*c*) Page 47.

him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honorable species of tenure, but at the same time subjected the tenants to greater and more burthensome services than inferior tenures did. (*d*) This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. There seems to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character [*61] of a soldier or a freeman to perform; *as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretense; as, to pay a stated annual rent, or to plough such a field for three days.

(*d*) In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, &c., which hold directly from the emperor, are called the *immediate* states of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hist. xliii, 61.

The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author ancient or modern, (*e*) of which the following is the outline or abstract. (*f*) "Tenements are of two kinds, *frank-tenement* and *villenage*. And, of frank-tenements, some are held freely in consideration of homage and *knight-service;* others in *free-socage* with the service of fealty only." And again, (*g*) "of villenages some are pure, and others privileged. He that holds in *pure villenage* shall do whatever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called *villein-socage;* and these villein-socmen do

(*e*) *L.* 4, *tr.* 1, *c.* 28.

(*f*) *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum.* § 1.

(*g*) *Villenagiorum aliud parum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei præceptum fuerit, et semper tenebitur ad incerta. Aliud genus villenagii dicitur villanum socagium; et hujusmodi villani socmanni—villana faciunt servitia, sed certa, et determinata.* § 5.

villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was *free* but *uncertain,* as military service with homage, that tenure was called the tenure in [*62] *chivalry, *per servitium militare,* or by knight-service. Secondly, where the service was not only *free,* but also *certain,* as by fealty only, by rent and fealty, etc., that tenure was called *liberum socagium,* or free socage. These were the only *free* holdings or tenements; the others were *villenous* or servile; as thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium,* absolute or pure villenage. Lastly, where the service was *base* in its nature, but reduced to a *certainty,* this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum;* or it might still be called socage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villanum socagium,* villein-socage.

I. The first, most universal, and esteemed the most honorable species of tenure, was that by knight-service, called in Latin *servitium militare;* and in law French *chivalry,* or *service de chivaler,* answering to the *fief d'haubert* of the Normans, (*h*) which name is expressly given it by the Mirrour. (*i*) This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of

(*h*) Spelm. *Gloss.* 219. (*i*) C. 2. § 27.

the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare;* the measure of which in 3 Edw. I, was estimated at twelve ploughlands, (*k*) and its value (though it varied with the times) (*l*) in the reigns of Edward I and Edward II, (*m*) was stated at 20*l. per annum.* And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon; (*n*) which attendance was his *reditus* or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion. (*o*) And there is reason to *apprehend that this service was the whole that [*63] our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight-service had all the marks of a strict and regular feud; it was granted by words of pure donation, *dedi et concessi;* (*p*) was transferred by investiture or delivering corporal possession of the land,

(*k*) *Pasch.* 3 Edw. I. Co. Litt. 69.

(*l*) 2 Inst. 596.

(*m*) Stat. Westm. 1, c. 36. Stat. *de milit.* 1 Edw. II. Co. Litt. 69.

(*n*) See writs for this purpose in *Memorand. Scacch.* 36, prefixed to Maynard's yearbook, Edw. II.

(*o*) Litt. § 95.

(*p*) Co. Litt. 9.

usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz.: aid, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavor to explain, and to show to be of feudal original.

1. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress; (*q*) but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three; first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vassal's power, was by the strict rigor of the feudal law an absolute forfeiture of his estate. (*r*) Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms: (*s*) the intention of it being to breed up the eldest son and heir apparent of the seignory, to deeds of arms and chivalry, for the better defense of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions

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(*q*) *Auxilia, fiunt de gratia et non de jure,—cum dependeant ex gratia tenentium, et non ad voluntatem dominorum.* Bracton, *l.* 2 *tr.* 1, *c.* 16. § 8.

(*r*) *Feud. l.* 2, *t.* 24.

(*s*) 2 Inst. 233.

were in those days extremely slender, few lords being able to save much out of *their income for [*64] this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms; nor by the nature of their tenure, could they charge their lands with this or any other incumbrances. From bearing their proportion to these aids, no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden), and the marriage of his female descendants. (*t*) And one cannot but observe in this particular the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defense and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; viz.: to marry the patron's daughter; to pay his debts and to redeem his person from captivity. (*u*)

But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more: as, aids to pay the lord's debts (probably in imitation of the Romans),

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(*t*) Phillip's Life of Pole, I, 223.

(*u*) *Erat autem hæc inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in æris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.* Paul Manutius *de senatu Romano. c.* 1.

and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused as they held immediately of the king, who had no superior. To prevent this abuse, King John's *Magna Charta* (*v*) ordained that no aids be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three ancient ones above mentioned. But this provision was omitted in Henry III's charter, and the same oppressions were continued till the 25 Edward I, when the statute called *confirmatio chartarum* was enacted; which in this respect revived King John's charter, by ordaining that none but the ancient aids should be taken. But though the species of aids was thus [*65] *restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable; (*w*) and that the aids taken by the king of his tenants *in capite* should be settled by parliament. (*x*) But they were never completely ascertained and adjusted till the statute Westm. 1, 3 Edw. I, c. 36, which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter: and the same was done with regard to the king's tenants *in capite* by statute 25 Edw. III, c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

(*v*) *Cap.* 12, 15. (*w*) *Ibid.* 15. (*x*) *Ibid.* 14.

2. Relief, *relevium,* was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure; especially when, at the first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief it was in effect to disinherit the heir. (*y*) The English ill brooked this consequence of their new-adopted policy; and therefore William the Conqueror, by his law (*z*) *ascertained* the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war should be paid by the earls, barons, and vavasours, respectively: and if the latter had no arms, they should pay 100*s*. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws; thereby in effect obliging every heir to new-purchase or *redeem* his land: (*a*) but his brother Henry I, by the charter before mentioned, restored his father's law; [*66] *and ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption. (*b*) But afterwards, when, by an or-

(*y*) Wright, 99.
(*z*) *C.* 22, 23, 24.
(*a*) 2 Roll. Abr. 514.
(*b*) "*Hæres non redimet terram suam sicut faciebat tempore*

dinance in 27 Hen. II, called the assize of arms, it was provided that every man's armor should descend to his heir, for defense of the realm; and it thereby became impracticable to pay these acknowledgments in arms according to the laws of the Conqueror, the composition was universally accepted of 100*s.* for every knight's fee; as we find it ever after established. (*c*) But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

3. *Primer seisin* was a feudal burthen, only incident to the king's tenants *in capite,* and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession, and half a year's profits if the lands were in reversion expectant on an estate for life. (*d*) This seems to be little more than an additional relief, but grounded upon this feudal reason; that by the ancient law of feuds, immediately upon the death of a vassal, the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: during which interval the lord was entitled to take the profits; and, unless the heir claimed within

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fratris mei, sed legitima et justa relevatione relevabit eam." (*Text. Roffens. Cap.* 34.)

(*c*) Glanv. *l.* 9, *c.* 4. Litt. § 112.

(*d*) Co. Litt. 77.

a year and a day, it was by the strict law a forfeiture. (*e*) This practice however seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but as to the king's tenures *in capite,* the *prima seisina* was expressly declared, under Henry III and Edward II, to belong to the king by prerogative, in contradistinction to other lords. (*f*) The king was entitled to enter and receive the *whole profits of the land, till livery was sued; which suit being commonly made within a year and a day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the *first fruits,* that is to say, one year's profits of the land. (*g*) And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England, the first year's profits of his benefice, by way of *primitiæ,* or first fruits. [*67]

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female, (*h*) the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law sup-

(*e*) *Feud. l.* 2, *t.* 24.
(*f*) Stat. Marlb. c. 16. 17 Edw. II, c. 3.
(*g*) Staundf. Prerog. 12.
(*h*) Litt. § 103.

posed the heir-male unable to perform knight-service till twenty-one: but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1, 3 Edw. I, c. 22, the two additional years being given by the legislature for no other reason but merely to benefit the lord. (*i*)

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person [*68] *to supply the infant's services, till he should be of age to perform them himself. And if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation

(*i*) Litt. § 103.

was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I, before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

When the male-heir arrived to the age of twenty-one, or the heir-female to that of sixteen, they might sue out their livery or *ousterlemain;* (*k*) that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profit of the land; though this seems expressly contrary to *Magna Charta.* (*l*) However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins. (*m*) In order to ascertain the profits that arose to the crown by these first fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county, (*n*) commonly called an *in-*

(*k*) Co. Litt. 77.
(*l*) 9 Hen. III, c. 3.
(*m*) Co. Litt. 77.
(*n*) Hoveden, *sub. Ric. I.*

quisitio post mortem; which was instituted to inquire (at the death of any man of fortune) the value of his [*69] estate, the tenure by which it was *holden, and who, and of what age his heir was; thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII, that by color of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto. (*o*) And afterwards, a court of wards and liveries was erected, (*p*) for conducting the same inquiries in a more solemn and legal manner.

When the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony, as was formerly hinted, (*q*) is supposed

(*o*) 4 Inst. 198.

(*p*) Stat. 32 Hen. VIII, c. 46.

(*q*) Book I, p. 404.

to have been the original of the feudal knighthood. (*r*) This prerogative, of compelling the king's vassals to be knighted, or to pay a fine, was expressly recognized in parliament by the statute *de militibus,* 1 Edw. II; was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI, and Queen Elizabeth; but yet was the occasion of heavy murmers when exerted by Charles I; among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion of prerogative. However, among the other concessions made by *that unhappy [*70] prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the crown, and it was accordingly abolished by statute 16 Car I, c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage* (*maritagium,* as contradistinguished from *matrimonium*), which in its feudal sense signifies the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality; which if the infants refused, they

(*r*) "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameaque juvenem ornant. Hæc apud illos toga, hic primus juventæ honos: ante hoc domus pars videntur; mox republicæ.*" *De Mor. Germ. cap.* 13.

forfeited the value of the marriage, *valorem maritagii;* (*s*) that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance; (*t*) and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii.* (*u*) This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy; (*w*) but no tolerable pretense could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim of strictly feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards; (*x*) which was introduced into England, together with the rest of the Norman doctrine of feuds; and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the First, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were [*71] not *married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of

(*s*) Litt. § 110.
(*t*) Stat. Mert. c. 6. Co. Litt. 82.
(*u*) Litt. § 110.
(*w*) Bract. *l.* 2, c. 37, § 6.
(*x*) Gr. Const. 95.

their wards in a very arbitrary, unequal manner, it was provided by King John's great charter that heirs should be married without disparagement, the next of kin having previous notice of the contract; (*y*) or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagenter, et per consilium propinquorum de consanguinitate sua.* (*z*) But these provisions in behalf of the relations were omitted in the charter of Henry III; wherein (*a*) the clause stands merely thus, *"hæredes maritentur absque disparagatione:"* meaning certainly, by *hæredes,* heirs female, as there are no traces before this to be found of the lord's claiming the marriage (*b*) of heirs male; and as Glanvil (*c*) expressly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both *sive sit masculus sive fœmina,* as Bracton more than once expresses it; (*d*) and also as nothing but disparagement was restrained by *Magna Charta,* they thought themselves at liberty to make all other advantages that they could. (*e*) And afterwards this right, of selling the ward in marriage, or else receiving the price or value of it, was ex-

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(*y*) *Cap.* 6 edit. *Oxon.*

(*z*) *Cap.* 3, *ibid.*

(*a*) *Cap.* 6.

(*b*) The words *maritare* and *maritagium* seem *ex vi termini* to denote the providing of an *husband.*

(*c*) *L.* 9, *c.* 9 & 12, & *l.* 9, *c.* 4.

(*d*) *L.* 2, *c.* 38, § 1.

(*e*) Wright, 97.

pressly declared by the statute of Merton; (*f*) which is the first direct mention of it that I have met with, in our own or any other law.

6. Another attendant or consequence of tenure by knight-service was that of *fines* due to the lord for every *alienation,* whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection; it not being reasonable or allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the *feudal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment.* This restraint upon the lords soon wore away; that upon the tenants continued longer. For when everything came in process of time to be bought and sold, the lords would not grant a license to their tenant to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite,* who were never able to aliene without a license: but as to common persons, they were at liberty by *Magna Charta,* (*g*) and the statute of

[*72]

(*f*) 20 Hen. III, c. 6. (*g*) *Cap.* 32.

quia emptores (*h*) (if not earlier), to aliene the whole of their estate, to be holden of the same lord as they themselves held it of before. But the king's tenants *in capite* not being included under the general words of these statutes, could not aliene without a license; for if they did, it was in ancient strictness an absolute forfeiture of the land; (*i*) though some have imagined otherwise. But this severity was mitigated by the statute 1 Edw. III, c. 12, which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a license of alienation; but if the tenant presumed to aliene without a license, a full year's value should be paid. (*k*)

7. The last consequence of tenure in chivalry was *escheat;* which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out *and abolished. In such cases the lands escheated, or fell back to the lord of the fee; (*l*) that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the

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(*h*) 18 Edw. I, c. 1.
(*i*) 2 Inst. 66.
(*k*) *Ibid.* 67.
(*l*) Co. Litt. 13.

feud extended; in the other, the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vassel, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it. (*m*)

These were the principal qualities, fruits, and consequences of tenure by knight-service: a tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite,* till the middle of the last century; and which was created, as Sir Edward Coke expressly testifies, (*n*) for a military purpose, viz.: for defense of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of a knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so-called, though improperly, because the service or render was of a free and honorable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty, per magnum servitium,* whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person; as to

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(*m*) *Feud. l.* 2, *t.* 86. (*n*) 4 Inst. 192.

carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation. (*o*) It was in most other respects like knight-service; (*p*) only he was not bound to pay aid, (*q*) or escuage; (*r*) *and, when tenant by knight-service paid [*74] five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little. (*s*) Tenure by *cornage,* which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty. (*t*)

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti; scutum* being then a well-known denomination for money: and, in like manner, it was called, in our Norman French, *escuage;* being indeed a pecuniary, instead of a military, service. The first time this appears to have been taken was in the 5

(*o*) Litt. § 153. (*p*) *Ibid.* § 158. (*q*) 2 Inst. 233.
(*r*) Litt. § 158. (*s*) *Ibid.* § 154. (*t*) *Ibid.* § 156.

Hen. II, on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments in the time of Hen. II seem to have been made arbitrarily, and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamor; and King John was obliged to consent by his *Magna Charta,* that no scutage should be imposed without consent of parliament. (*u*) But this clause was omitted in his son Henry III's charter, where we [*75] only find (*w*) that scutages *or escuage should be taken as they were used to be taken in the time of Henry II: that is, in a reasonable and moderate manner. Yet afterwards, by statute 25 Edw. I, cc. 5, 6, and many subsequent statutes, (*x*) it was again provided, that the king should take no aids or tasks but by the common consent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament; (*y*) such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

Since therefore escuage differed from knight-service

(*u*) *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri. Cap.* 12.

(*w*) *Cap.* 37. (*x*) See book I, page 140.

(*y*) Old Ten. *tit. Escuage.*

in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton (*z*) must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected (*a*) as a tenure in chivalry. (*b*) But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled, invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-service, would have then been of another kind, called socage, (*c*) of which we shall speak in the next chapter.

For the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honor, and their oaths, to defend their king and country, the whole of this system of *tenures [*76] now tended to nothing else but a wretched means

(*z*) § 103. (*a*) Wright, 122.
(*b*) *Profeodo militari reputatur.* Flet. *l.* 2, *c.* 14, § 7.
(*c*) Litt. § 97, 120.

of raising money to pay an army of occasional mercenaries. In the meantime the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids,* whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin;* and if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith (*d*) very feelingly complains, "when he came to his own, after he was out of *wardship,* his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren," to reduce him still farther, he was yet to pay half a year's profits as a fine for suing out his *livery;* and also the price or value of his *marriage,* if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this, the untimely and expensive honor of *knighthood,* to make his poverty more completely splendid. And when by these deductions his fortune was so shattered

(*d*) Commonw. *l.* 3, *c.* 3.

and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him without paying an exorbitant fine for a *license* of *alienation.*

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of King James I consented, (*e*) in consideration of a proper equivalent, to abolish them all; though the plan *proceeded not to effect; in like manner [*77] as he had formed a scheme, and begun to put it into execution, for removing the feudal grievance of heritable jurisdiction in Scotland, (*f*) which has since been pursued and effected by the statute 20 Geo. II, c. 43. (*g*) King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient seemingly much better than the

(*e*) 4 Inst. 202.

(*f*) Dalrymp. of Feuds, 292.

(*g*) By another statute of the same year (20 Geo. II, c. 50) the tenure of *wardholding* (equivalent to the knight-service of England) is forever abolished in Scotland.

hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages (having during the usurpation been discontinued) were destroyed at one blow by the statute 12 Car. II, c. 24, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values, and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite,* be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage: save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grant serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *Magna Charta* itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigor; but the statute of King Charles extirpated the whole, and demolished both root and branches.

CHAPTER VI.

OF THE MODERN ENGLISH TENURES.

Although, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution itself was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since by the statute 12 Car. II, the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll, were reserved; nay all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known, and subsisting, called *free and common* socage. And this being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system; since it is that alone to which we can recur, to explain any seeming or real difficulties that may arise in our present mode of tenure.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honorable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free-socage,* consisted also of free and honorable services; but such as were

liquidated and reduced to an absolute certainty. [*79] And this tenure not only subsists to *this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure. And to this we are next to proceed.

II. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton; (*a*) if a man holds by rent in money, without any escuage or serjeanty, *"id tenementum dici potest socagium:"* but if you add thereto any royal service, or escuage, to any, the smallest amount, *"illud dici poterit feodum militare."* So, too, the author of Fleta; (*b*) *"ex donationibus, servitia militaria vel magnæ serjantiæ non continentibus, oritur nobis quoddam nomen generale, quod est socagium."* Littleton also (*c*) defines it to be, where the tenant holds his tenement of the lord by any *certain* service in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards (*d*) he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch, (*e*) a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage: as

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(*a*) *L.* 2, *c.* 16, § 9. (*b*) *L.* 3, *c.* 14, § 9.
(*c*) § 117. (*d*) § 118. (*e*) L. 147.

to hold by fealty and 20*s.* rent; or by homage, fealty and 20*s.* rent: or, by homage and fealty without rent or, by fealty and certain corporal service, as ploughing the lord's land for three days; or by fealty only without any other service: for all these are tenures in socage. (*f*)

But socage, as was hinted in the last chapter, is of two sorts: *free* socage, where the services, are not only certain, but honorable; and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil, (*g*) and other subsequent authors, by the name of *liberi sokemanni,* or tenants in free-socage. Of this tenure we are first to speak; and this, both in the *nature of its [*80] service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word; (*h*) who derives it from the Saxon appellation *soc,* which signifies liberty or privilege, and being joined to a usual termination, is called *socage,* in Latin *socagium;* signifying thereby a free or privileged tenure. (*i*) This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca,* an old Latin word, denoting (as they tell us) a plough: for that in ancient time

(*f*) Litt. § 117, 118, 119. (*g*) *L.* 3, *c.* 7.

(*h*) Gavelk. 138.

(*i*) In like manner Skene, in his exposition of the Scots' law, title *socage,* tell us, that it is "any kind of holding of lands quhen ony man is infeft *freely.*" *&c.*

this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage or plough-service. (*k*) But this by no means agrees with what Littleton himself tells us, (*l*) that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original (as escuage, which, while it remained uncertain, was equivalent to knight-service), the instant they were reduced to a certainty changed both their name and nature, and were called socage. (*m*). It was the *certainty* therefore that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme,* (*n*) tells us, that they are "lands and tenements whereof the nature of the fee is changed by feoffment *out of chivalry* for *certain* yearly services, and in respect whereof neither homage, ward, marriage, nor relief can be demanded." Which leads us also to another observation, that if socage tenures were of [*81] such base and servile *original, it is hard to account for the very great immunities which the

(*k*) Litt. § 119. (*l*) § 118.
(*m*) § 98, 120. (*n*) *C.* 66.

tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I and Charles II, a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to *fraunke ferme* or tenure by socage. We may, therefore, I think, fairly conclude in favor of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself.

Taking this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty: retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honorable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent called gavelkind, which is generally acknowledged to be a species of socage tenure; (*o*) the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty,* tenure in *burgage,* and *gavelkind.*

(*o*) Wright, 211.

We may remember that, by the statute 12 Car. II, grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it: for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, etc., at the coronation) are still reserved. Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both [*82] tending to some purpose relative to the king's *person. Petit serjeanty, as defined by Littleton, (*p*) consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says, (*q*) is but socage in effect: for it is no personal service, but a certain rent: and, we may add, it is clearly no predial service, or service of the plough, but in all respects *liberum et commune socagium:* only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis,* or petit serjeanty. And *Magna Charta* respected it in this light, when it enacted, (*r*) that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty.

Tenure in *burgage* is described by Glanvil, (*s*) and is expressly said by Littleton, (*t*) to be but tenure in socage: and it is where the king or other person is lord of an ancient borough, in which the tenements are held

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(*p*) § 159. (*q*) § 160. (*r*) *Cap.* 27.
(*s*) *Lib.* 7, *cap.* 3. (*t*) § 162.

by a rent certain. (*u*) It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other towns by the right of sending members to parliament, and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage, therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy; which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plough-service; since the *tenants must have been citi- [*83] zens or burghers, the situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plough, or was able to use one, if he had it. The free socage, therefore, in which these tenements are held, seems to be plainly a

(*u*) Litt. § 162, 163.

remnant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in ancient burgage: the principal and most remarkable of which is that called *Borough English,* so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil, (*w*) and by Littleton; (*x*) viz.: that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton (*y*) gives this reason; because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors (*z*) have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night; and that therefore the tenement descended not to the eldest, but the youngest son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland (under the name of *mercheta* or *marcheta*), till abolished by Malcolm III. (*a*) And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pas-

(*w*) *Ubi supra.* (*x*) § 165.
(*y*) § 211. (*z*) 3 Mod. Pref.
(*a*) Seld. tit. of hon. 2, 1, 47. *Reg. Mag. l.* 4, *c.* 31.

torial life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son, therefore, who continues latest with his father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one *became his heir. (*b*) So that [*84] possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of *all* her husband's tenements, (*c*) and not of the third part only, as at the common law: and that, in others, a man might dispose of his tenements by will, (*d*) which, in general, was not permitted after the conquest till the reign of Henry the Eighth; though in the Saxon times it was allowable. (*e*) A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

The nature of the tenure in *gavelkind* affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that

(*b*) *Pater cunctos filios adultos a se pellebat, præter unum quem hæredem sui juris relinquebat.* (*Walsingh. Upodigm. Neustr. c.* 1.)

(*c*) Litt. § 166. (*d*) § 167. (*e*) Wright, 172.

we meet with the custom of gavelkind (though it was and is to be found in some other parts of the kingdom), (*f*) we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm. (*g*) The distinguishing properties of this tenure are various; some of the principal are these: 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen. (*h*) 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being "the father to the bough, the son to the plough." (*i*) 3. In most places he had a power of devising lands by will, before the statute for that purpose was made. (*k*) 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together; (*l*) which was indeed anciently the most usual *course of descent all over [*85] England, (*m*) though in particular places, particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner; and yet it is said to be only a species of

(*f*) Stat. 32 Hen. VIII, *c.* 29. Kitch. of courts, 200.

(*g*) *In toto regno, ante ducis adventum, frequens et usitata fuit: postea cæteris adempta, sed privatis quorundam locorum consuetudinibus alibi postea regerminans; Cantianis solum integra et inviolata remansit.* (*Analect. l.* 2, *c.* 7.)

(*h*) Lamb. Peramb. 614.

(*i*) Lamb, 634.

(*k*) F. N. B. 198. Cro. Car. 561.

(*l*) Litt. § 210.

(*m*) Glanvil, *l.* 7, *c.* 3.

a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain. (*n*) Wherefore by a charter of King John, (*o*) Hubert, Archbishop of Canterbury, was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury, into tenures by knight's service; and by statute 31 Hen. VIII, c. 3, for disgaveling the lands of diverse lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage.* Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

Having thus distributed and distinguished the several species of tenure in free socage, I proceed next to show that this also partakes very strongly of the feudal nature, which may probably arise from its ancient Saxon original; since (as was before observed) (*p*) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same

(*n*) Wright, 211.

(*o*) Spelm. *cod. vet. leg.* 355.

(*p*) Page 48.

state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favor and affection to their particular owners, and partly from their own insignificancy: since I do not apprehend the number of socage tenures soon after the conquest to have been very considerable, nor their value by any means large; till by successive *charters of enfranchisement granted [*86] to the tenants, which are particularly mentioned by Britton, (*q*) their number and value began to swell so far, as to make a distinct, and justly envied, part of our English system of tenures.

However this may be, the tokens of their feudal original will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

1. In the first place, then, both were held of superior lords; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and his tenant.

2. Both were subject to the feudal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was

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(*q*) C. 66.

a feud of the improper kind, it was certain, fixed, and determinate (though perhaps nothing more than bare fealty), and so continues to this day.

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant. (*r*) Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton, (*s*) that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done) whether the land be holden of the lord or not; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencies. (*t*)

4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest *daughter: (*u*) which were fixed by the statute of Westm. 1, c. 36, at 20*s*. for every 20*l*. [*87] *per annum* so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as a matter of right; but were all abolished by the statute 12 Car. II.

(*r*) Litt. § 117, 131. (*s*) § 130.

(*t*) *Eo maxime præstandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur* (*Corvin. jus feod. l.* 2, *t.* 7.)

(*u*) Co. Litt. 91.

5. Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l.* or one-quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small: (*w*) and therefore Bracton (*x*) will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini.* So too the statute 28 Edw. I, c. 1, declares, that a free sokeman shall give *no relief,* but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved about measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due even though the heir was under age, because the lord has no wardship over him. (*y*) The statute of Charles II reserves the reliefs incident to socage tenures: and, therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of a tenant. (*z*)

6. Primer seisin was incident to the king's socage tenants *in capite,* as well as to those by knight-service. (*a*) But tenancy *in capite* as well as primer seisins are, among the other feudal burthens, entirely abolished by the statute.

7. Wardship is also incident to tenure in socage; but

(*w*) Litt. § 126.
(*x*) *L.* 2, *c.* 37, § 8.
(*y*) Litt. § 127.
(*z*) 3 Lev. 145.
(*a*) Co. Litt. 77.

of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because in this tenure, no military or *other personal service [*88] being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully explained, together with the reasons for it, in the former book of these commentaries. (*b*) At fourteen this wardship in socage ceases; and the heir may oust the guardian and call him to account for the rents and profits: (*c*) for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it; that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute, 12 Car.

(*b*) Book I, page 461. (*c*) Litt. *s.* 123. Co. Litt. 89.

II, c 24, enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the court of chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

8. Marriage, of the *valor maritagii,* was not in socage tenure any perquisite or advantage to the guardian but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage.(*d*) For, the law in favor of infants is always jealous of guardians, and therefore, in this case it made them account, not only for what they *did,* but also for what they *might,* receive on the in-
[*89] fant's behalf; *lest by some collusion the guardian should have received the value, and not brought it to account; but the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of King Edward's laws, that were restored by Henry the First's charter, as might alone

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(*d*) Litt. *s.* 123.

convince us that socage was of a higher original than the Norman conquest.

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure as well as in case of tenure by knight-service: for the statutes that relate to this point, and Sir Edward Coke's comment on them, (*e*), speak generally of all tenants *in capite,* without making any distinction: but now all fines for alienation are demolished by the statute of Charles the Second.

10. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs. (*f*)

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter; so that lands of both sorts are now holden *by one universal tenure of free and common socage.*

The other grand division of tenure, mentioned by Bracton, as cited in the preceding chapter, is that of *villenage,* as contradistinguished from *liberum tenementum,* or frank tenure. And this (we may remember) he subdivided into two classes, *pure* and *privileged* villenage: from whence have arisen two other species of our modern tenures.

(*e*) 1 Inst. 43. 2 Inst. 65, 66, 67. (*f*) Wright, 210.

*III. From the tenure of pure villenage have [*90] sprung our present *copy-hold* tenures, or tenure by copy of court roll at the will of the lord: in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

Manors are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day; (*g*) just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. A manor, *manerium, a manendo,* because the usual residence of the owner seems to have been a district of ground, held by lords or great personages; who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales* or *demesne* lands; being occupied by the lord, or *dominus manerii,* and his servants. The other, or *tenemental,* lands they distributed among their tenants; which from the different modes of tenure were distinguished by two different names. First, *book-land,* or charter-land, which was held by deed under certain rents and free services, and in effect differed nothing from the free-socage lands; (*h*) and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land,* which was held by no assurance in writing, but distributed among the

(*g*) Co. Cop. s. 2 & 10. (*h*) Co. Cop. s. 3.

common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common or pasture to the lord and his tenants. Manors were formerly called baronies, as they are still lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor; and for settling disputes of property among the tenants. This court is an inseparable ingredient.
of every manor; and if the number *of suitors [*91] should so fail as not to leave sufficient to make
a jury or homage, that is, two tenants at least, the manor itself is lost.

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves: which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his seignory is frequently termed an honor, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. In imitation whereof these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum:* till the superior lords observed, that by this

method of subinfeudation they lost all their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant,* or him who occupied the land; and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *Magna Charta,* 9 Hen. III (which is not to be found in the first charter granted by that prince, nor in the great charter of King John,) (*i*) that no man should either give or sell his land, without reserving sufficient to answer the demand of his lord; and afterwards the statute of Westm. 3, or *quia emptores,* 18 Edw. I, c. 1, which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions, not extending to the king's own tenants *in capite,* the like law concerning them is declared by the statutes of *prerogativa regis,* 17 Edw. II, c. 6, and of 34 Edw. III, c. 15, by which last all subinfeudations, previous [*92] to the reign of King *Edward I, were confirmed: but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day must have existed as early as King Edward the First: for it is

(*i*) See the Oxford editions of the charters.

essential to a manor that there be tenants who hold of the lord; and by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores,* could create any new tenants to hold of himself.

Now with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman, or Saxon; but mixed and compounded of them all: (*k*) and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks, (*l*) a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they who were strangers to any other than a feudal state might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. (*m*) This they called villenage, and

(*k*) Wright, 215.
(*l*) Introd. Hist. Engl. 59.
(*m*) Wright, 217.

the tenants villeins, either from the word *vilis,* or else, as Sir Edward Coke tells us; (*n*) *a villa;* because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: resembling the Spartan *helotes,* to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honorable employment of mankind.

*These villeins, belonging principally to lords [*93] of manors, were either villeins *regardant,* that is annexed to the manor or land: or else they were *in gross,* or at large, that is, annexed to the person of the lord and transferable by deed from one owner to another. (*o*) They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices: (*p*) and their services were not only base, but uncertain both as to their time and quantity. (*q*) A villein, in short, was in much the same

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(*n*) 1 Inst. 116. (*o*) Litt. s. 181. (*p*) *Ibid.* s. 127.

(*q*) *Ille qui tenet in villenagio faciet quicquid ei præceptum fuerit, nec scire debet sero quia facere debet in crastino, et semper tenebitur ad incerta.* (Bracton, *l.* 4, *tr.* 1, *c.* 28.)

state with us, as Lord Molesworth (*r*) describes to be that of the boors in Denmark, and which Stiernhook (*s*) attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity. (*t*)

In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord, (*u*) and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property. (*w*) For the children of villeins were also in the same state of bondage with their *parents; [*94] whence they were called in Latin, *nativi,* which gave rise to the female appellation of a villein, who was called a *neife.* (*x*) In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequiter ventrem.* But no bastard could be born a villein, because of another maxim in our law, he is *nullius filius:*

(*r*) *C.* 8.
(*s*) *De jure Sueonum, l.* 2, *c.* 4.
(*t*) Litt. s. 177.
(*u*) Co. Litt. 140.
(*w*) Litt. s. 202.
(*x*) *Ibid.* s. 187.

and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it.(*y*) The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill or maim his villein: (*z*) though he might beat him with impunity; since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person. Neifes indeed had also an appeal of rape in case the lord violated them by force.(*a*)

Villeins might be enfranchised by manumission, which is either express or implied; express, as where a man granted to the villein a deed of manumission: (*b*) implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years; (*c*) for this was dealing with his villein on the footing of a freeman; it was in some of the instances giving him an action against his lord and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him; (*d*) for as the lord might have a short remedy against his villein, by seizing his goods, (which was more than equivalent to any damages he could recover,) the law, which is always ready to catch at any thing in favor of liberty, presumed

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(*y*) *Ibid.* s. 187, 188.
(*a*) *Ibid.* s. 190.
(*c*) S. 204, 5, 6.
(*z*) *Ibid.* s. 189, 194.
(*b*) *Ibid.* s. 204.
(*d*) Litt. s. 208.

that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied *manumission. But, in case the [*95] lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

Villeins, by these and many other means, in process of time gained considerable grounds on their lord; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better, than their lords. For the good-nature and benevolence of many lords of manors having time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands, in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to shew for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be

called *tenants by copy of court-roll,* and their tenure itself a *copyhold.* (*e*)

Thus copyhold tenures, as Sir Edward Coke observes, (*f*) although very meanly descended, yet come of an ancient house; for, from what has been premised it appears, that copyholders are in truth no other but villeins, who by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely [*96] at the lord's will. Which *affords a very substantial reason for the great variety of customs that prevail in different manors with regard both to the descent of the estates, and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II, there was hardly a pure villein left in the nation. For Sir Thomas Smith (*g*) testifies, that in all his time (and he was secretary to Edward VI) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining, were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that "holy fathers, monks, and friars, had in their confessions, and especially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one Christian man to hold another in bondage: so that temporal men,

(*e*) F. N. B. 12. (*f*) Cop. s. 32.
(*g*) Commonwealth, b. 3, c. 10.

by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs: for they also had a scruple in conscience to impoverish and despoil the church so much, as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still." By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders; their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a small pecuniary quit-rent. (*h*)

*As a further consequence of what has been [*97] premised, we may collect these two main principles, which are held (*i*) to be the supporters of the copyhold tenure, and without which it cannot exist: 1. That the land be parcel of, and situate within that

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(*h*) In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, to lop his trees, and reap his corn, and the like; the lord usually finding them meat and drink, and sometime (as is still the use in the highlands of Scotland) a minstrel or piper for their diversion. (*Rot. Maner. de Edgware Comm. Mid.*) As in the kingdom of Whidah, on the slave coast of Africa, the people are bound to cut and carry in the king's corn from off his demesne lands, and are attended by music during all the time of their labor. (Mod. Un. Hist. xvi, 429.)

(*i*) Co. Litt. 58.

manor, under which it is held. 2. That they have been demised, or demisable, by copy of court-roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death, nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services (as well in rents as otherwise), reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter, (*j*) are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hard-

(*j*) See ch. 28.

ship in it, when all the goods and chattels belonged to the lord, and he might have seized them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship, in copyhold estates, *partakes both of that in chivalry and that in socage. Like [*98] that in chivalry, the lord is the legal guardian; who usually assigns some relation of the infant tenant to act in his stead; and he, like the guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for the alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom; but, even when arbitrary, the courts of law, in favor of the liberty of copyholds, have tied them down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of the estate. (*k*) From this instance we may judge of the favorable disposition that the law of England (which is a law of liberty) hath always shewn to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better

(*k*) 2 Ch. Rep. 134.

of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor: and, where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, and will not suffer the lord to extend his power so far as to disinherit the tenant.

Thus much for the ancient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord,* which is lineally descended from it.

IV. There is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged* villenage, and sometimes of *villein-socage.* This, he tells us, (*l*) is such as has been held of the kings of [*99] England from the conquest *downwards; that the tenants herein, *"villana faciunt servitia, sed certa et determinata;"* that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can: but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz. the tenure in *ancient demesne;* to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium.*

(*l*) *L.* 4, *tr.* 1, *c.* 28.

Ancient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by the great survey in the exchequer called domesday-book. (*m*) The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies, (*n*) continued for a long time pure and absolute villeins, dependent on the will of the lord; and those who have succeeded them in their tenures now differ from common copyholders in only a few points. (*o*) Others were in a great measure enfranchised by the royal favor; being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services: all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them; (*p*) as to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process, denominated a writ of *right close;* (*q*) not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries; and the like. (*r*)

(*m*) F. N. B. 14, 16.
(*n*) *C.* 66.
(*o*) F. N. B. 228.
(*p*) 4 Inst. 269.
(*q*) F. N. B. 11.
(*r*) *Ibid.* 14.

[*100] *These tenants therefore, though their tenure be absolutely copyhold, yet have an *interest* equivalent to a freehold: for notwithstanding their services were of a base and villenous original, (*s*) yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: *"et ideo,"* says Bracton, *"dicuntur liberi,"* Britton also, from such their freedom, calls them absolutely *sokemans,* and their tenure *sokemanries;* which he describes (*t*) to be "lands and tenements which are not held by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being, as it were, lands enfranchised by the king or his predecessors from their ancient demesne." And the same name is also given them in Fleta. (*u*) Hence Fitzherbert observes (*w*) that no lands are ancient demesne, but lands holden in socage; that is, not in free and common socage, but in this amphibious subordinate class of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing, with Bracton, between free socage or socage of frank tenure, and villein-socage or socage of ancient demesne.

(*s*) Gilb. hist. of exch. 16 and 30.
(*t*) C. 66.
(*u*) *L.* 1, *c.* 8.
(*w*) N. B. 13.

Lands holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges before mentioned: as also they differ from free holders by one special mark and tincture of villenage, noted by Bracton, and remaining to this day, viz.: that they cannot be conveyed from man to man by the general common-law conveyances of feoffment, and the rest; but must pass by surrender, to the lord or his steward, in the manner of common copyholds: *yet with this distinction, (x) that in the surrender of these lands [*101] in ancient demesne, it is not used to say *"to hold at the will of the lord"* in their copies, but only, *"to hold according to the custom of the manor."*

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon æra to 12 Car. II, all lay tenures are now in effect reduced to two species; *free* tenure in common socage, and *base* tenure by copy of court-roll.

I mentioned *lay* tenures only; because there is still behind one other species of tenure, reserved by the statute of Charles II, which is of a *spiritual* nature, and called the tenure in frankalmoign.

(x) Kitchen on courts, 194.

V. Tenure in *frankalmoign in libera eleemosyna,* or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever. (*y*) The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the soul of the donor and his heirs, dead or alive; and, therefore, they did no fealty, (which is incident to all other services but this,) (*z*) because this divine service was of a higher and more exalted nature. (*a*) This is the tenure, by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations hold them at this day; (*b*) the nature of the service being upon the reformation altered, and made com-
[*102] formable to the purer doctrines *of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shewn to religion and religious men in ancient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas,* of repairing the highways, building castles, and repelling invasions: (*c*) just as the Druids, among the ancient Britons, had *omnium rerum immunitatem.* (*d*) And, even at present, this is a tenure of a nature very distinct from all others;

(*y*) Litt. s. 133.
(*z*) *Ibid.* s. 131.
(*a*) *Ibid.* s. 135.
(*b*) Bracton *l.* 4, *tr.* 1, *c.* 28, § 1.
(*c*) Seld. *Jan.* 1, 42.
(*d*) *Cæsar de bell, Gall. l.* 6, *c.* 13.

being not in the least feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden: but merely a complaint to the ordinary or visitor to correct it. (*e*) Wherein it materially differs from what was called *tenure by divine service;* in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrein, without any complaint to the visitor. (*f*) All such donations are indeed now out of use: for, since the statute of *quia emptores,* 18 Edw. I, none but the king can give lands to be holden by this tenure. (*g*) So that I only mention them because *frankalmoign* is excepted by name in the statute of Charles II, and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it: herewith concluding our observations on the nature of tenures.

(*e*) Litt. s. 136. (*f*) *Ibid.* 137. (*g*) *Ibid.* 140.

CHAPTER VII.

OF FREEHOLD ESTATES OF INHERITANCE.

The next objects of our disquisitions are the nature and properties of *estates.* An estate in lands, tenements, and hereditaments, signifies such *interest* as the tenant has therein: so that if a man grants all of *his estate* in Dale to A and his heirs, every thing that he can possibly grant shall pass thereby. (*a*) It is called in Latin *status;* it signifying the condition, or circumstance, in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a three-fold view: *first,* with regard to the *quantity of interest* which the tenant has in the tenement: *secondly,* with regard to the *time* at which that quantity of interest is to be enjoyed: and *thirdly,* with regard to the *number* and *connections* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man: to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months or days: or lastly, it is infinite and unlimited, being vested in him and his representatives forever. And

(*a*) Co. Litt. 345.

this occasions the primary division of *estates into such as are *freehold,* and such as are *less* [*104] *than freehold.*

An estate of freehold, *liberum tenementum,* or frank-tenement, is defined by Britton (*b*) to be the "*possession* of the soil by a freeman." And St. Germyn (*c*) tells us, that "the possession of the land is called in the law of England the frank-tenement or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold:* which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton, (*d*) that where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates.

Estates of freehold (thus understood) are either estates *of inheritance,* or estates *not of inheritance.* The former are again divided into inheritances *absolute,* or

(*b*) C. 32.

(*c*) Dr. & Stud. b. 2, d. 22.

(*d*) § 59.

fee-simple; and inheritances *limited,* one species of which we usually call fee-tail.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever: (*e*) generally, absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is *taken in contradistinc-
[*105] tion to *allodium;* (*f*) which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium,* and therefore is said to be seized thereof absolutely *in dominico suo,* in his own demesne. But *feodum,* or fee, is that which is held of some superior on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman (*g*) defines a feud or fee to be the right which the vassal or tenant hath in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services: the mere allodial *propriety* of the soil always remaining in the lord. This allodial property no subject in England has; (*h*) it being a received, and now undeniable principle in the law, that all the lands in

(*e*) Litt. § 1.
(*f*) See pp. 45, 47.
(*g*) Of feuds, c. 1.
(*h*) Co. Litt. 1.

England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium:* (*i*) but all subjects' lands are in the nature of *fcodum* or fee: whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it, (*k*) he hath *dominiun utile,* but not *dominium directum.* And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have, by these words: "he is seised thereof *in his demesne, as of fee.*" It is a man's demesne, *dominicum,* or property, since it belongs to him and his heirs forever: yet this *dominicum,* property, or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, *as of fee:* that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

*This is the primary sense and acceptation of the word *fee.* But (as Sir Martin Wright very [*106] justly observes) (*l*) the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely

(*i*) *Prædium domini regis est directum dominum, cujus nullus est author nisi Deus.* Ibid.

(*k*) Co. Litt. 1. (*l*) Of ten, 148.

(of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium,* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee* therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it, (as a fee or a fee-simple,) it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man. (*m*)

Taking therefore *fee* for the future, unless where otherwise explained in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal. (*n*) But there is this distinction between the two species of hereditaments: that, of a corporeal inheritance a man shall be said to be seized *in his demesne, as of fee;* of an incorporeal one, he shall only be said to be seized *as of fee,* and not in his demesne. (*o*) For, as in-

(*m*) Co. Litt. 1.

(*n*) *Feodum est quod quis tenet sibi et hæredibus suis, sive sit tenementum, sive reditus, &c.* Flet. *l.* 5, *c.* 5.

(*o*) Litt. § 10.

corporeal hereditaments are in their nature collateral to, and issue out of, lands and houses, (*p*) their owner hath no property, *dominicum,* or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitutes,* or services, of the civil law. (*q*) The *dominicum* or property is frequently *in one man, while the appendage or service is in another. Thus Gaius may be seized *as of fee* of a way leading over the land, of which Titius is seized *in his demesne as of fee.* [*107]

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance,* that is, (as the word signifies,) in expectation, remembrance, and contemplation in law; there being no person *in esse* in whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres*

(*p*) See page 20.

(*q*) *Servitus est jus, quo res mea alterius rei vel personæ servit. Ff.* 8, 1, 1.

viventis: it remains therefore in waiting or abeyance, during the life of Richard. (*r*) This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance. (*s*) And not only the fee, but the freehold also, may be an abeyance; as, when a parson dies, the freehold of his glebe is in abeyance, until a successor be named, and then it vests in the successor. (*t*)

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life. (*u*) This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which [*108] we may remember (*w*) it was required, *that the form of the donation should be punctually pursued; or that, as Cragg (*x*) expresses it in the words of Baldus, *"donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit."* And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to

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(*r*) Co. Litt. 342.
(*s*) Litt. § 646.
(*t*) *Ibid.* § 647.
(*u*) *Ibid.* § 1.
(*w*) See page 56.
(*x*) *l.* 1, *t.* 9, § 17.

his heirs. But this rule is now softened by many exceptions. (*y*)

For, 1. It does not extend to devises by will; in which, as they were introduced at the time when the feudal rigor was apace wearing out, a more liberal construction is allowed; and therefore by a devise to a man forever, or to one and his assigns forever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more. 2. Neither does this rule extend to fines or recoveries considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs," as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed. (*z*) 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs"; for heirship is implied in the creation, unless it be otherwise specially provided: but in creations by patent, which are *stricti juris* the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors"

(*y*) Co. Litt. 9, 10. (*z*) Co. Litt. 9.

supplies the place of "heirs"; for as heirs take from the ancestor, so doth the successor from the prede-
[*109] cessor. Nay, in *a grant to a bishop, or other sole spiritual corporation, in *frankalmoign,* the word *"frankalmoign"* supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini;* and in all these cases a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one.(*a*) 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies.(*b*) But the general rule, is that the word "heirs" is necessary to create an estate of inheritance.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts: 1. *Qualified,* or *base* fees; and, 2. Fees *conditional,* so called at the common law; and afterwards fees-*tail,* in consequence of the statute *de donis.*

1. A base, or qualified fee, is such a one as hath a

(*a*) See book I, p. 484. (*b*) See book I, p. 249.

qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A and his heirs, *tenants of the manor of Dale;* in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated. So when Henry VI granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity,(*c*) and, the instant he or his heirs quitted the seignory of this manor, the dignity was at an end. This *estate is a fee, because by possi- [*110] bility it may endure forever in a man and his heirs: yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: "*donatio stricta et coarctata;* (*d*) *sicut certis hæredibus, quibusdam a successione exclusis;*" as to the heirs *of a man's body,* by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body,* in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular

(*c*) Co. Litt. 27. (*d*) Flet. *l.* 3, *c.* 3, § 5.

heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor. (*e*) Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws. (*f*)

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore call it a fee-simple, on condition that he had issue. Now we must observe, that when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed becomes absolute, *and wholly [*111] unconditional. So that, as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least for these three purposes: 1, To enable the tenant to aliene the land, and thereby to bar not only his own

(*e*) Plowd. 241.

(*f*) *Si quis terram hæreditariam habeat, eam non vendat a cognatis hæredibus suis, si illi viro prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat. LL. Ælfred, c.* 37.

issue, but also the donor of his interest in the reversion. (*g*) 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated. (*h*) 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue. (*i*) And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious; and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs *of his body,* and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple abso-

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(*g*) Co. Litt. 19. 2 Inst. 233.
(*h*) Co. Litt., *ibid.* 2 Inst. 234.
(*i*) Co. Litt. 19.

lute, that would descend to the heirs general according to the course of the common law. And thus stood the old law with regard to conditional fees: which things, says Sir Edward Coke, (*k*) though they seem ancient, are yet necessary to be known; as well for the declaring how the common law stood in such cases as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law.

*The inconveniences which attended these [*112] limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second (*l*) (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public consideration whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

(*k*) 1 Inst. 19.

(*l*) 13 Edw. I, c. 1.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail;* (*m*) and investing in the donor the ultimate fee-simple of the land, expectant on the failure of issue: which expectant estate is what we now call a reversion. (*n*) And hence it is that Littleton tells us (*o*) that tenant in fee-tail is by virtue of the statute of Westminster the second.

Having thus shewn the *original* of estates-tail, I now proceed to consider, *what things* may, or may not, be entailed *under the statute *de donis.* [*113] *Tenements* is the only word used in the statute; and this Sir Edward Coke (*p*) expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savor of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within, the same; as, rents, estovers, commons, and the like. Also offices

(*m*) The expression fee-tail, or *feodum talliatum*, was borrowed from the feudists (see Crag. *l.* 1, *t.* 10, *s.* 24, 25); among whom it signified any mutilated or truncated inheritance, from which the heirs general were *cut* off; being derived from the barbarous verb *taliare*, to cut; from which the French *talier* and the Italian *tagliare* are formed. (Spelm., *Gloss.* 531.)

(*n*) 2 Inst. 335.

(*o*) § 13.

(*p*) 1 Inst. 19, 20.

and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. (*q*) But mere personal chattels, which savor not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels: nor an annuity, which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee-conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner. (*r*) An estate to a man and his heirs for another's life cannot be entailed: (*s*) for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis.* Neither can a copyhold estate be entailed by virtue of the *statute;* for that would tend to encroach upon and restrain the will of the lord: but, by the *special custom* of the manor, a copyhold may be limited to the heirs of the body; (*t*) for here the custom ascertains and interprets the lord's will.

Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special.* Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten:* which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *performam doni.*

(*q*) 7 Rep. 33.
(*r*) Co. Litt. 19, 20.
(*s*) 2 Vern. 225.
(*t*) 3 Rep. 8.

(*u*) Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may *happen several ways. (*w*) I shall instance in only one; [*114] as where lands and tenements are given to a man and the *heirs of his body on Mary his now wife to be begotten;* here no issue can inherit, but such general issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee: but they being heirs *to be by him begotten,* this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten (viz.: *Mary his present wife*), this makes it a fee-tail special.

Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female.* As if lands be given to a man, and his *heirs male of his body begotten,* this is an estate in tail male general; but if to a man and the heirs *female of his body on his present wife begotten,* this is an estate in tail female special. And, in case of an entail male the heirs female shall never inherit, nor any derived from them; nor *e converso,* the heirs male, in case of a gift in tail female. (*x*) Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the

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(*u*) Litt. § 14, 15. (*w*) *Ibid.* § 16, 26, 27, 28, 29.
(*x*) *Ibid.* § 21, 22.

estate-tail; for he cannot deduce his descent wholly by heirs male. (*y*) And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates-tail, the one in tail mail, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates; for he cannot convey his descent wholly either in the male or female line. (*z*)

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word *body,* or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular *the fee is limited. If, there-
[*115] fore, either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body,* to a man and his *seed,* to a man and his *children,* or *offspring:* all these are only estates for life, there wanting the words of inheritance, his heirs. (*a*) So, on the other hand, a gift to a man, and his *heirs male or female,* is an estate in fee-simple, and not in fee-tail: for there are no words to ascertain the body out of which they shall issue. (*b*) Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed,* or to a man and

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(*y*) *Ibid.* § 24.
(*z*) Co. Litt. 25.
(*a*) Co. Litt. 20.
(*b*) Litt. § 31. Co. Litt. 27.

his *heirs male;* or by other irregular modes of expression. (*c*)

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio,* or *frank-marriage.* These are defined (*d*) to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frank-marriage. Now, by such gift, though nothing but the word *frank-marriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frank-marriage* does *ex vi termini* not only create an inheritance, like the word *frank-almoign,* but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frank-marriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee. (*e*)

The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these. (*f*) 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same.

*2. That the wife of the tenant in tail shall [*116] have her *dower,* or thirds, of the estate-tail.

3. That the husband of a female tenant in tail may be

(*c*) Co. Litt. 9, 27.
(*d*) Litt. § 17.
(*e*) *Ibid.* § 19, 20.
(*f*) Co. Litt. 224.

tenant by the *courtesy* of the estate-tail. 4. That an estate-tail may be *barred,* or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large.

Thus much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott) (*g*) occasioned infinite difficulties and disputes. (*h*) Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under color of long leases the issue might have been virtually disinherited; creditors were defrauded of their debts; for, if a tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. (*i*) But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there

(*g*) Com. Recov. 5.

(*h*) 1 Rep. 131.

(*i*) Co. Litt. 19. Moor, 156. 10 Rep. 38.

was little hope of procuring a repeal by the legislature, and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *de donis,* and the application of common recoveries to this intent, in the twelfth year of Edward IV; which were then openly declared by the judges to be a *sufficient bar of an estate- [*117] tail.(*k*) For though the courts had, so long before as the reign of Edward III, very frequently hinted their opinion that a bar might be effected upon these principles, (*l*) yet it was never carried into execution; till Edward IV, observing (*m*) (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court;(*n*) wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they

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(*k*) 1 Rep. 131. 6 Rep. 40.

(*l*) 10 Rep. 37, 38.

(*m*) Pigott, 8.

(*n*) Year-book, 12 Edw. IV, 14, 19. Fitzh. *Abr. tit. faux recov.* 20 Bro. *ibid.* 30 *lit. recov. in value,* 19. *tit. taile,* 36.

are fictitious proceedings, introduced by a kind of *pia fraus,* to elude the statute *de donis,* which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and that these recoveries, however clandestinely introduced, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament (*o*) have by a sidewind countenanced and established them.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious [*118] prince then reigning, finding them frequently *resettled in a similar manner to suit the convenience of families, had address enough to procure a statute (*p*) whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

(*o*) 11 Henry VII, c. 20. 7 Henry VIII, c. 4. 34 and 35 Henry VIII, c. 20. 14 Eliz. *c.* 8. 4 and 5 Ann, c. 16. 14 Geo. II, c. 20.

(*p*) 26 Hen. VIII, c. 13.

The next attack which they suffered in order of time, was by the statute 32 Henry VIII, c. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow in the same session of parliament, by the construction put upon the statute of fines,(*q*) by the statute 32, Henry VIII, c. 36, which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII, whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favorably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they should *not* be a bar to estates-tail. But the statute of Henry VIII, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the

(*q*) 4 Hen. VII, c. 24.

crown from any danger of infringement, all estates-tail created by the crown and of which the crown had the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 and 35 Henry VIII, c. 20, which enacts, that no feigned recovery had against tenants in tail, where the estate was created by the *crown, (*r*) and [*119] the remainder or reversion continues still in the crown, shall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

Lastly, by a statute of the succeeding year, (*s*) all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws, (*t*) they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz., c. 4, an appointment (*u*) by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail is now enabled to aliene his

(*r*) Co. Litt. 372.
(*s*) 33 Hen. VIII, c. 39, § 75.
(*t*) Stat. 21 Jac. I, *c.* 19.
(*u*) 2 Vern. 453. Chan. Prec. 16.

lands and tenements by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason; and lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.

CHAPTER VIII.

OF FREEHOLDS, NOT OF INHERITANCE.

We are next to discourse of such estates of freehold as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional,* or expressly created by the act of the parties; others merely *legal,* or created by construction and operation of law.(*a*) We will consider them both in their order.

1. Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other persons, or for more lives than one: in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *per auter vie.*(*b*) These estates for life are, like inheritances, of feudal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen) (*c*) was not in its original hereditary. They are given or conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

(*a*) Wright, 190. (*b*) Litt. § 56. (*c*) Page, 55.

*Estates for life may be created, not only by the express words before mentioned, but also by [*121] a general grant, without defining or limiting any specific estate. As, if one grants to A B the manor of Dale, this makes him tenant for life.(*d*) For though, as there are no words of inheritance or *heirs* mentioned in the grant, it cannot be construed to be a fee, it shall however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life *of the grantee;*(*e*) in case the grantor hath authority to make such grant; for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor, (*f*) unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life for which they are created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone.(*g*) Yet while they

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(*d*) Co. Litt. 42.
(*e*) *Ibid.*
(*f*) *Ibid.* 36.
(*g*) Co. Litt. 42. 3 Rep. 20.

subsist, they are reckoned estates for life: because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law: (*h*). for which reason in conveyances the grant is usually made "for the term of a man's *natural* life"; which can only determine by his *natural* death. (*i*)

[*122] *The *incidents* to an estate for life are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those which are created by act and operation of law.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers* (*k*) or *botes*. (*l*) For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber, or do other waste upon the premises: (*m*) for the destruction of such things as are not the temporary profits of the tenement is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.

2. Tenant for life, or his representatives, shall not be

(*h*) 2 Rep. 48.
(*i*) See book I, p. 132.
(*k*) See p. 35.
(*l*) Co. Litt. 41.
(*m*) *Ibid.* 53.

prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. (*n*) Therefore if a tenant for his own life sows the lands and dies before harvest, his executors shall have the *emblements* or profits of the crop: for the estate was determined by the *act of God,* and it is a maxim in the law, that *actus Dei nemini facit injuriam.* The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense of tilling, manuring and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end *of August, the heirs of the tenant received the whole. (*o*) From hence our [*123] law of emblements seems to have been derived, but with very considerable improvements. So it is, also, if a man be tenant for the life of another, and *cestui que vie,* or he on whose life the land is held, dies after the corn sown, the tenant *per auter vie* shall have the emblements. The same is also the rule, if a life estate be determined by the *act of law.* Therefore if a lease be made to husband and wife during coverture (which

(*n*) *Ibid.* 55. (*o*) *Feud l.* 2, t. 28.

gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii,* the husband shall have the emblements in this case; for the sentence of divorce is the act of law.(*p*) But if an estate for life be determined by the tenant's *own act* (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry), in these and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements.(*q*) The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass and the like; which are not planted annually at the expense and labor of the tenant, but are either a permanent or natural profit of the earth.(*r*) For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to him in future, and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII, c. 11. For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

3. A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay,

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(*p*) 5 Rep. 116. (*q*) Co. Litt. 55.
(*r*) Co. Litt. 55, 56. 1 Roll. Abr. 728.

greater indulgences than their lessors, the original tenants for life. The same; for the law of estovers and emblements *with regard to the tenant for [*124] life, is also law with regard to his under-tenant, who represents him and stands in his place: (*s*) and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate:* her taking husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her. (*t*) The lessees of tenants for life had also at the common law another most unreasonable advantage; for at the death of their lessors, the tenants for life, these under-tenants, might if they pleased quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter day, or other day assigned for the payment of rent. (*u*) To remedy which it is now enacted, (*v*) that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent from the last day of payment to the death of such lessor.

(*s*) Co. Litt. 55.

(*t*) Cro. Eliz. 461. 1 Roll. Abr. 727.

(*u*) 10 Rep. 127.

(*v*) Stat. 11 Geo. II, c. 19, § 15.

II. The next estate for life is of the legal kind, as contradistinguished from conventional; viz: that of tenant *in tail after possibility of issue extinct.* This happens where one is tenant in special tail; and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue:(*w*) in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special,* that *would not have distinguished him from others; and besides, he has no longer an estate of inheritance or fee,(*x*) for he can have no heirs capable of taking *per formam doni.* Had it called him *tenant in tail without issue,* this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue* this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of tenant *in tail after possibility of issue extinct,* which (with a precision peculiar to our own law) not

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(*w*) Litt. § 32. (*x*) 1 Roll. Rep. 184. 11 Rep. 80.

only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii,* they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them.(*y*) A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.(*z*)

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as not to be punishable for waste, &c.; (*a*) or, he is tenant in tail, with many of the restrictions of a tenant for life; as to forfeit his estate, if he alienes it in fee-simple:(*b*) whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest, [*126] *till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this

(*y*) Co. Litt. 28.
(*z*) Litt. § 34. Co. Litt. 28.
(*a*) Co. Litt. 27.
(*b*) Co. Litt. 28.

tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. Tenant *by the curtesy of England,* is where a man marries a woman seized of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail; and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England. (*c*)

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the Mirrour (*d*) to have been introduced by King Henry the First; but it appears also to have been the established law of Scotland, wherein it was called *curialitas,* (*e*) so that probably our word *curtesy* was understood to signify rather an attendance upon the lord's *court* or *curtis* (that is, being his vassal or tenant), than to denote any peculiar favor belonging to this island. And therefore it is laid down (*f*) that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of King Henry III. (*g*) It also appears

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(*c*) Litt. § 35, 52.
(*d*) c. 1, § 3.
(*e*) Crag. *l.* 2, c. 19, § 4.
(*f*) Litt. § 90. Co. Litt. 30, 67.
(*g*) *Pat.* 11 *H. III, m.* 30, in 2 Bac. Abr. 659.

(*h*) to have obtained in Normandy; and was likewise used among the ancient Almains or Germans. (*i*) And yet it is not generally apprehended to have been a consequence of feudal tenure, (*k*) though I think some substantial feudal reasons may be given for its introduction. For if a woman seized of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to *the profits of the lands in order to [*127] maintain it; for which reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant. (*l*) As soon, therefore, as any child was born, the father began to have a permanent interest in the lands; he became one of the *pares curtis,* did homage to the lord, and was called tenant by the curtesy *initiate;* and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife. (*m*) 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder

(*h*) *Grand Coustum, c.* 119.

(*i*) Lindenbrog. *LL. Alman. t.* 92.

(*k*) Wright, 294. (*l*) F. N. B. 143. (*m*) Co. Litt. 30.

or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife: as in case of an advowson, where the church has not become void in the lifetime of the wife: which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem.* (*n*) If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king by prerogative is entitled to them, the instant she herself has any title; and since she could never be rightfully seized of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy. (*o*) 3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the *strongest* evidence of its being born alive; but it is not the *only* evidence. (*p*) The issue also must be born during the life of the mother; for if the mother dies in labor, and the Cæsarean operation is performed, the husband [*128] in this case shall not be tenant by the *curtesy; because, at the instant of the mother's death he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him. (*q*) In gavelkind lands, a husband may be tenant by the cur-

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(*n*) Co. Litt. 29.
(*o*) Co. Litt. 30. Plowd. 263.
(*p*) Dyer 25. 8 Rep. 34.
(*q*) Co. Litt. 29.

tesy, without having any issue. (*r*) But in general there must be issue born: and such issue as is also capable of inheriting the mother's estate. (*s*) Therefore, if a woman be tenant in tail *male,* and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male. (*t*) And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seized; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife: but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seized: and therefore, as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. (*u*) And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture; for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy. (*w*) The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate* (*x*) and

(*r*) *Ibid.* 30. (*s*) Litt. § 56. (*t*) Co. Litt. 29.
(*u*) Co. Litt. 40. (*w*) Co. Litt. 29. (*x*) *Ibid.* 30.

may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy. (*y*)

[*129] *IV. Tenant in *dower* is where the husband of a woman is seized of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold to herself for the term of her natural life. (*z*)

Dower is called in Latin by the foreign jurists *doarium,* but by Bracton and our English writers *dos:* which among the Romans signified the marriage portion which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there anything in general more different, than the regulation of landed property according to the English and Roman laws. Dower out of the lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of King Edmond, (*a*) the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one-half of the lands; with a proviso that she remained chaste and unmarried (*b*); as is usual also in copyhold dowers or free bench. Yet

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(*y*) *Ibid.* (*z*) Litt. § 36. (*a*) Wilk. 75.
(*b*) Somner. Gavelk. 51 Co. Litt. 33. Bro. *Dower,* 70.

some have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple laws of feuds, but was first of all introduced into that system (wherein it was called *triens tertia* (*d*) and *dotalitium*) by the Emperor Frederick the Second; (*e*) who was contemporary with our King Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their *jewels to ransom him when taken prisoner by [*130] the Vandals. (*f*) However this be, the reason which our law gives for adopting it, is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children. (*g*)

In treating of this estate, let us, first, consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and, fourthly, how dower may be *barred* or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii,* she shall not be en-

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(*d*) Crag. *l.* 2, *t.* 22, § 9.
(*e*) *Ibid.*
(*f*) Mod. Un. Hist. xxxii. 91.
(*g*) Bract. *l.* 2, *c.* 39. Co. Litt. 30.

dowed; for *ubi nullum matrimonium ibi nulla dos.* (*h*) But a divorce *a mensa et thoro* only, doth not destroy the dower; (*i*) no, not even for adultery itself by the common law. (*k*) Yet now by the statute Westm. 2 (*l*) if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy; (*m*) but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law, the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde, (*n*) that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may, though Britton (*o*) gives it another turn, viz.: that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. VI, c. 12, abated the rigor of the common law in this particular [*131] and allowed *the wife her dower. But a subsequent statute (*p*) revived this severity against

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(*h*) Bract. *l.* 2, *c.* 39, § 4.

(*i*) Co. Litt. 32.

(*k*) Yet, among the ancient Goths, an adulteress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. *l.* 3, *c.* 2.)

(*l*) 13 Edw. I, *c.* 34.

(*m*) Co. Litt. 31.

(*n*) P. C. b. 3, c. 3.

(*o*) c. 110.

(*p*) 5 & 6 Edw. VI, c. 11.

the widows of traitors, who are now barred of their dower, (except in the case of certain modern treasons relating to the coin,) (*q*) but not the widows of felons. An alien also cannot be endowed unless she be queen consort; for no alien is capable of holding lands. (*r*) The wife must be above nine years old at her husband's death, otherwise she shall not be endowed: (*s*) though in Bracton's time the age was indefinite, and dower was then only due *"si uxor possit dotem promereri, et virum sustinere."* (*t*)

2. We are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seized in fee-simple or fee-tail, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir. (*u*) Therefore, if a man be seized in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have, could

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(*q*) Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II, c. 28.

(*r*) Co. Litt. 31.

(*s*) Litt. § 36.

(*t*) *l.* 2, *c.* 9, § 3.

(*u*) Litt. §§ 36, 53.

by any possibility inherit them. (*v*) A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but if such lands whereof the wife, or he himself in her right, was actually seized in deed. (*w*) The seisin of the husband, for a [*132] *transitory instant* **only,* when the same act which gives him the estate conveys it also out of him again (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine) such a seisin will not entitle the wife to dower; (*x*) for the land was merely *in transitu,* and never rested in the husband, the grant and render being one continued act. But, if the land abides in him for the interval of but a *single moment,* it seems that the wife shall be endowed thereof. (*y*) And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some

(*v*) *Ibid.* § 53.

(*w*) Co. Litt. 31.

(*x*) Cro. Jac. 615. 2 Rep. 67. Co. Litt. 31.

(*y*) This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate in fee by survivorship, in consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503.)

special reason to the contrary. Thus a woman shall not be endowed of a castle built for defense of the realm: (*z*) nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. (*a*) Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free bench. (*b*) But where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower. (*c*)

3. Next, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower; the fifth, mentioned by Littleton, (*d*) *de la plus belle,* having been abolished together with the military tenures, of which it was a consequence. 1. Dower by the *common law;* or that which is before described. 2. Dower by particular *custom;* (*e*) as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiæ,* (*f*) which is where tenant in fee-*simple of full age, openly at the church [*133] door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke in his translation of Littleton, adds) troth plighted be-

(*z*) Co. Litt. 31. 3 Lev. 401.
(*a*) Co. Litt. 32. 1 Jon. 315.
(*b*) 4 Rep. 22.
(*c*) Co. Litt. 32.
(*d*) Co. Litt. §§ 48, 49.
(*e*) Litt. § 67.
(*f*) *Ibid.* § 39.

tween them, doth endow the wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, may enter without further ceremony. 4. Dower *ex assensu patris;* (*g*) which is only a species of dower *ad ostium ecclesiæ,* made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made (*h*) *in facie ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia.*

It is curious to observe the several revolutions which the doctrine of dower has undergone since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before mentioned; viz.: a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I, this condition of widowhood and chastity was only required in case the husband left any issue; (*i*) and afterwards we hear no more of it. Under Henry the Second, according to Glanvil, (*k*) the dower

(*g*) *Ibid.* § 40.

(*h*) Bracton, *l.* 2, c. 39, § 4.

(*i*) *Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit;—si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit.* (*Cart. Hen. I, A. D.* 1001.) Introduc. to great charter, *edit. Oxon.* pag. iv.

(*k*) *l.* 6, *c.* 1 and 2.

ad ostium ecclesiæ was the most usual species of dower; and here, as well as in Normandy, (*l*) it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feudal rigor, was the husband allowed to endow her *ad ostium ecclesiæ* with more than the third part of the lands whereof he then was seized, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits. (*m*) But if no specific dotation was made at the *church porch, then she was endowed *by the* [*134] *common law* of the third part (which was called her *dos rationabilis*) of such lands and tenements as the husband was seized of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions: (*n*) and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals was a bar of any dower (*o*) in lands which he afterwards acquired. (*p*) In King John's *Magna Charta,* and the first

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(*l*) *Gr. Coustum. c.* 101.

(*m*) Bract. *l.* 2, *c.* 39, § 6.

(*n*) *De questu suo.* (Glan. *ib.*)—*de terris acquisitis et acquirendis.* (Bract. *ib.*)

(*o*) Glanv. c. 2.

(*p*) When special endowments were made *ad ostium ecclessiæ*, the husband after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife (*quod dotam eam de tali manerio cum pertinentiis, &c.* Bract. *ibid.*) and therefore in the old York ritual (Seld. *Ux. Hebr. l.* 2, c. 27), there is, at this part of the matrimonial service the follow-

chapter of Henry III, (*q*) no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217 and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime: (*r*) yet in case of a specific endowment of less *ad ostium ecclesiæ,* the widow had still no power to waive it after her husband's death. And this continued to be law during the reigns of Henry III and Edward I. (*s*) In Henry IV's time it was denied to be law, that a woman can be endowed

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ing rubic: *sacerdos interroget dotem mulieris et si terra ei in dotem detur, tunc dicatur psalmus iste, &c.*" When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis;* Bract. *ib.*) the husband seems to have said, "with all my lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with all my worldly goods (or, as the Salisbury ritual has it, *with all my worldly chattel*) I thee endow;" which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by *Magna Charta, cap.* 26, and will be farther treated of in the concluding chapter of this book; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

(*q*) A. D. 1216, *c.* 7, *edit. Oxon.*

(*r*) *Assignetur autem ei pro dote sua tertia pars totius terræ mariti sui quæ sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiæ* C. 7. (*Ibid.*)

(*s*) Bract. *ubi supra.* Britton, c. 101, 102. Flet. *l.* 5, *c.* 23, §§ 11, 12.

of her husband's goods and chattels: (*t*) and, under Edward IV, Littleton lays it down *ex- [*135] pressly, that a woman may be endowed *ad ostium ecclesiæ* with more than a third part; (*u*) and shall have her election, after her husband's death, to accept such dower or refuse it, and betake herself to her dower at common law. (*w*) Which state of uncertainty was probably the reason, that the specific dowers, *ad ostium ecclesiæ* and *ex assensu patris,* have since fallen into total disuse.*

I proceed, therefore, to consider the method of endowment or assigning dower, by the common law, which is now the only usual species. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his license; lest she should contract herself, and so convey part of the feud, to the lord's enemy. (*x*) This license the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order

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(*t*) *P.* 7 *Hen. IV*, 13, 14.

(*u*) § 39. F. N. B. 150.

(*w*) § 41.

(*) The only species of dower which exist in the United States are: 1. Dower at the common law, under which head would be included all cases in which dower exists independent of statute, or only regulated by it; and 2. Dower by statute, where something is given as a substitute for that to which the widow was entitled as dower before. See 1 Washb. Real Prop. 149.—Note to Cooley's Blackstone.

(*x*) Mirr. *c.* 1, § 3.

to gain the fine. But, to remedy these oppressions, it was provided, first by the charter of Henry I, (*y*) and afterwards by *Magna Charta,* (*z*) that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh, if she chooses to live without a husband; but shall not however marry against the consent of the lord; and farther, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarantine,* a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other. (*a*) The particular lands, to be held in dower must be assigned (*b*) by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant *thereof to [*136] the lord, and the widow is immediate tenant to the heir, by a kind of sub-infeudation, or under-tenancy completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores,* because the heir parts not with

(*y*) *Ubi supra.*

(*z*) *cap.* 7.

(*a*) It signifies, in particular, the forty days, which persons coming from infected countries are obliged to wait, before they are permitted to land in England.

(*b*) Co. Litt. 34, 35.

the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it.(*c*) Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower.(*d*) If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.(*e*)

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the ancient law respecting dower *ad ostium ecclesiæ,* which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to inquire, lastly,

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement,

(*c*) *Ibid.*

(*d*) F. N. B. 148. Finch. L. 314. Stat. Westm. 2. 13 Edw. I, c. 7.

(*e*) Co. Litt. 32.

divorce, being an alien, the treason of her husband, and other disabilities before mentioned, but also by detaining the title deeds or evidences of the estate from the heir, until she restores them: (*f*) and, by the statute of Gloucester, (*g*) if a dowager alienes the land assigned her for dower, she forfeits it *ipso *facto,* and the heir [*137] may recover it by action. A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture. (*h*) But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII, c. 10.

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke; (*i*) "a competent livelihood of freehold for the wife of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least." This description is framed from the purview of the statute 27 Hen. VIII, c. 10, before mentioned; commonly called the statute of *uses,* of which we shall speak fully hereafter. At present I have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the *use,* or profits thereof, in another;

(*f*) *Ibid.* 39.
(*g*) 6 Edw. I, c. 7.
(*h*) Pig. of recov. 66.
(*i*) 1 Inst. 36.

whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee-simple, yet the wife was not entitled to any dower therein; he not being *seized* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such as had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seized* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided, that *upon making such [*138] an estate in jointure to the wife before marriage, she shall be forever precluded from her dower. (*k*) But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *per auter vie,* or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her

(*k*) 4 Rep. 1. 2.

whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ,* and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law. (*l*)

There are some advantages attending tenants in dower that do not extend to jointresses; and so, *vice versa,* jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old com-

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(*l*) These settlements, previous to marriage, seem to have been in use among the ancient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account. "*Dotem non uxor marito, sed uxori maritus affert; intersunt parentes et propinqui, et munera probant.*" (*De mor. Germ. c.* 18.) And Cæsar (*de bello Gallico, l.* 6, *c.* 18) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure. "*Viri, quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis, æstimatione facta, cum dotibus communicant. Hujus omnis pecuniæ conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit.*" The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (*Nov.* 97) with regard to the provision for widows among the Romans; but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

mon law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt; if contracted during the coverture. (*m*) But, on the other *hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiæ,* which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. (*n*) And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow. (*o*) Wherefore Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiæ,* the most eligible species of any. [*139]

(*m*) Co. Litt. 31, a. F. N. B. 150.
(*n*) Co. Litt. 36.
(*o*) *Ibid.* 37.

CHAPTER IX.

OF ESTATES LESS THAN FREEHOLD.

Of estates that are less than freehold, there are three sorts: 1. Estates for years: 2. Estates at will: 3. Estates by sufferance.

I. An estate for *years* is a contract for the possession of lands or tenements, for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and lessee, (*a*) and the lessee enters thereon. (*b*) If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of. (*c*) And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

The space of a *year* is a determinate and well-known

(*a*) We may here remark, once for all, that the termination of "—or" and "—ee" (obtain in law, the one an active, the other a passive signification; the former usually denoting the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made; the donor is one that giveth lands in tail; the donee is he who receiveth it; he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. (Litt. § 57.)

(*b*) *Ibid*, 58. (*c*) *Ibid*, 67.

period, consisting commonly of 365 days; for
though in *bissextile or leap-year, it consists [*141]
properly of 366, yet, by the statute 21 Hen.
III, the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a *month* is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian division in our common almanacks, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for a "twelvemonth" in the singular number, it is good for the whole year.(*d*) For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. In the space of a *day* all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes.(*e*) Therefore, if I am bound to pay money on any certain

(*d*) 6 Rep. 61. (*e*) Co. Litt. 135.

day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to *receive and [*142] account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold; (*f*) which annihilated all leases for years then subsisting, unless afterwards renewed by the recoverer, whose title was supposed superior to his by whom those leases were granted.

While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent; and indeed we are told (*g*)

(*f*) Co. Litt. 46.

(*g*) Mirror, *c.* 2, § 27. Co. Litt. 45, 46.

that by the ancient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated; for we may observe in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerably exceed that period:(*h*) and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III, (*i*) and probably of Edward I. (*k*) But certainly, when by the statute 21 Hen. VIII, c. 15, the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, *and [*143] with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

Every estate which must expire at a period certain

(*h*) Madox *Formulare Anglican*, n°. 239, *fol.* 140. Demise for eighty years, 21 Ric. II, ... *Ibid.* n°. 245, *fol.* 146, for the like term, A. D. 1429. . . . . *Ibid.* n°. 248. *fol.* 148, for fifty years, 7 Edw. IV.

(*i*) 32 Ass. pl. 6. Bro. Abr. t. *mordauncestor*, 42; *spoliation*, 6.

(*k*) Stat. of mortmain, 7 Edw. I.

and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus,* because its duration of continuance is bounded, limited, and determined: for every such estate must have a certain beginning and certain end.(*l*) But *id certum est, quod certum reddi potest:* therefore if a man make a lease to another, for so many years as J S shall name, it is a good lease for years;(*m*) for though it is at present uncertain, yet when J S hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease.(*n*) A lease for so many years as J S shall live, is void from the beginning, (*o*) for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J S shall so long live, or if he should so long continue parson, is good:(*p*) for there is a certain period fixed beyond which it cannot last; though it may determine sooner, on the death of J S or his ceasing to be parson there.

We have before remarked, and endeavored to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even

(*l*) Co. Litt. 45.
(*m*) 6 Rep. 35.
(*n*) Co. Litt. 46.
(*o*) *Ibid.* 45.
(*p*) *Ibid.*

if it be *per auter vie,* is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate. (*q*) Hence it follows, that a lease for years may be made to commence *in futuro,* though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for [*144] *twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro;* because it cannot be created at common law without livery of seisin, or corporeal possession of the land; and corporeal possession cannot be given of an estate now, which is not to commence now, but hereafter. (*r*) And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seized,* or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term,* or *interesse termini:* but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed,* not properly of the land, but of the term of years: (*s*) the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word, *term,* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time;* as by surrender, forfeiture, and the like. For

(*q*) *Ibid.* 46. (*r*) 5 Rep. 94. (*s*) Co. Litt. 46.

which reason, if I grant a lease to A for the term of three years, and after the expiration of the said *term,* to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect: but if the remainder had been to B from and after the expiration of the said *three years,* or from and after the expiration of the said *time,* in this case B's interest will not commence till the time is fully elapsed; whatever may become of A's term. (*t*)

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers, which we formerly observed (*u*) that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote; (*w*) terms which have been already explained. (*x*)

*With regard to emblements, or the profits of [*145] lands sowed by tenant for years, there is this difference between him and tenant for life; that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he could never reap the profits of. (*y*) But where the lease for years depends upon an uncertainty: as, upon the death of a lessor, being himself only tenant for life,

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(*t*) *Ibid.* 45. (*u*) Page 122. (*w*) Co. Litt. 45.
(*x*) Page 35. (*y*) Litt. § 68.

or being a husband seized in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estates for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. (*z*) Not so if it determine by the act of the party himself: as if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default. (*a*)

II. The second species of estates not freehold are estates at *will*. An estate at will is where lands and tenements are left by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession. (*b*) Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will, is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connections with the other at his own pleasure. (*c*) Yet this must be understood with some restriction. *For if the tenant at will sows his [*146] land, and the landlord, before the corn is ripe, or before it is reaped, put him out, yet the tenant shall have

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(*z*) Co. Litt. 56.
(*a*) Ibid 55.
(*b*) Litt. § 68.
(*c*) Co. Litt. 55.

the emblements, and free ingress, egress, and regress, to cut and carry away the profits. (*d*) And this for the same reason upon which all the cases of emblements turn; viz.: The point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land. (*e*)

What act does, or does not amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land, (*f*) or notice must be given to the lessee) (*g*) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, (*h*) taking a distress for rent, and impounding it thereon, (*i*) or making a feoffment, or lease for years of the land, to commence immediately; (*k*) any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure, (*l*) or, which is

(*d*) *Ibid.* 56.
(*e*) *Ibid.* 55.
(*f*) *Ibid.*
(*g*) 1 Ventr. 248.
(*h*) Co. Litt. 55.
(*i*) *Ibid.* 57.
(*k*) 1 Rol. Abr. 860. 2 Lev. 88.
(*l*) Co. Litt. 55.

instar omnium, the death or outlawry of either lessor or lessee:(*m*) puts an end to or determines the estate at will.

The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of *emblements before mentioned; and, by a parity of reason, the lessee, after the [*147] determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils.(*n*) And if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half year.(*o*) And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months.(*p*)

There is one species of estates at will that deserves a

(*m*) 5 Rep. 116. Co. Litt. 57, 62.

(*n*) Litt. § 69.

(*o*) Salk. 414. 1 Sid. 339.

(*p*) This kind of lease was in use as long ago as the reign of Henry VIII, when half a year's notice seems to have been required to determine it. (*T.* 13 *Hen. VIII,* 15, 16.)

more particular regard than any other; and that is, an estate held by copy of court-roll: or, as we usually call it, a *copyhold* estate. This, as was before observed,(*q*) was in its original and foundation nothing better than a mere estate at will. But the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court-rolls to be, yet that will is qualified, restrained and limited, to be exerted according to the custom of the manor. This custom being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom as a tenant at will; the custom *having [*148] arisen from a series of uniform wills. And therefore, it is rightly observed by Calthorpe,(*r*) that "copyholders and customary tenants differ not so much in nature as in name; for although some be called copyholders, some customary, some tenants by the verge, some base tenants, some bond tenants, and some by one name and some by another, yet do they all agree in substance and kind of tenure; all the said lands are holden

(*q*) Page 93. (*r*) On copyholds, 51, 54.

in one general kind, that is, by custom and continuance of time; and the diversity of their names doth not alter the nature of their tenure."

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humor and temper of the respective ancient lords (from whence we may account for their great variety), such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition: subject however to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulgated by immemorial custom, has declared to be a forfeiture, or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of these interests amount to a freehold; for the freehold of the whole manor abides always in the lord only,(*s*) who hath granted out the use and occupation, but not the corporeal seisin or true legal possession, of certain parcels thereof, to these his customary tenants at will.

The reason of originally granting out this compli-

(*s*) Litt. § 81. 2 Inst. 325.

cated kind of interest, so that the same man shall, with regard to the same land, be at one and the same [*149] time tenant in fee-*simple, and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein. (*t*) The lords therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold lands of all must necessarily rest and abide somewhere, the law supposed it still to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be styled in their admissions tenants at the will of the lord, the law still supposed it an absurdity to allow that such as were thus nominally tenants at will could have any freehold interest; and therefore continued and now continues to determine, that the freehold of lands so holden

(*t*) Mirr. c. 2, § 28. Litt. §§ 204, 5, 6.

abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs forever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders of free or privileged tenure, which are derived from the ancient tenants in villein-socage, (*u*) and are not said to hold *at the will of the lord,* but only *according to the custom of the manor,* there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves; (*v*) who are sometimes called *customary freeholders,* being allowed to have a freehold *interest,* though not a freehold *tenure.*

*However, in common cases, copyhold estates are still ranked (for the reasons above mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements holden of the manor; nay sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, [*150]

(*u*) See page, 98, &c.

(*v*) Fitz. *Abr. tit. corone.* 310, *custom.* 12 *Bro. Abr. tit. custom,* 2, 17; *tenant per copie,* 22. 9 Rep. 76. Co. Litt. 59. Co. Copyh. § 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym. 1225.

and in other respects, particularly in the clearness and security of his title, to be frequently in a better situation.

III. An estate at *sufferance,* is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance. (*w*) But no man can be tenant at sufferance against the king, to whom no *laches,* or neglect in not entering and ousting the tenant is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder. (*x*) But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger: (*y*) and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful unless the owner of the land, by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

*Thus stands the law with regard to tenants [*151] by sufferance, and landlords are obliged in these cases to make formal entries upon their

(*w*) Co. Litt. 57. (*x*) *Ibid.* (*y*) *Ibid.*

lands,(z) and recover possession by the legal process of ejectment; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II, c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall willfully hold over after the determination of the term, and demand made and notice in *writing* given by him, to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession shall pay for the time he detains the lands, at the rate of double their yearly *value*. And by statute 11 Geo. II, c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent,* for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.

(z) 5 Mod. 384.

CHAPTER X.

OF ESTATES UPON CONDITION.

Besides the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition;* being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.(*a*) And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon conditions thus understood, are of two sorts: 1. Estates upon condition *implied:* 2. Estates upon condition *expressed:* under which last may be included, 3. Estates held *in vadio, gage,* or *pledge:* 4. Estates by *statute merchant,* or *statute staple:* 5. Estates held by *elegit.*

I. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words;

(*a*) Co. Litt. 201.

the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office,(*b*) on breach of which condition *it is lawful for the [*153] grantor, or his heirs, to oust him and grant it to another person.(*c*) For an office, either public or private, may be forfeited by *mis-user* or *non-user,* both of which are breaches of this implied condition. 1. By *mis-user,* or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user,* or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby.(*d*) For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief: upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.(*e*)

Upon the same principle proceed all the forfeitures which are given by law of life estates and others; for any

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(*b*) Litt. § 378.
(*c*) *Ibid.* § 379.
(*d*) Co. Litt. 233.
(*e*) 9 Rep. 50.

acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz.: that they shall not attempt to create a greater estate than they themselves are entitled to.(*f*) So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feudal donation.

[*154] *II. An estate on condition expressed in the grant itself is where an estate is granted, either in *fee-simple or otherwise,* with an express qualification annexed, whereby the estate granted shall either commence, be enlarged or be defeated, upon performance or breach of such qualification or condition.(*g*) These conditions are therefore either *precedent* or *subsequent.* Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no estate (*h*) is vested in A. Or, if a man

(*f*) Co. Litt. 215.

(*g*) *Ibid.* 201.

(*h*) Show. Parl. Cas. 83, &c.

grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid.(*i*) But if a man grants an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed.(*k*) To this class may also be referred all base fees, and fee-simples conditional at the common law.(*l*) Thus an estate to a man and his heirs, *tenants of the manor of Dale,* is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, it remains as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter: as *durante viduitate,* etc.; these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these *subsequent conditions, by the failure [*155] of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having

(*i*) Co. Litt. 217.
(*k*) Litt. § 325.
(*l*) See pages 109, 110, 111.

heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

A distinction is however, made between a *condition in deed* and a *limitation,* which Littleton (*m*) denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation:* as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.*, and the like. (*n*) In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that the* grantee continues unmarried, or *provided* he goes to York, etc.), (*o*) the law permits it to endure beyond the time when such contingency happens unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate. (*p*) Yet,

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(*m*) § 380. 1 Inst. 234. (*n*) 10 Rep. 41. (*o*) *Ibid.* 42.
(*p*) Litt. § 347. Stat. 32 Hen. VIII, c. 34.

though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a *condition:(q) because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but when it is a limitation, the estate of B determines, and that of D commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition.(r) [*156]

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life; or no estate at all, which is constructively an estate

(q) 1 Vent, 202.

(r) Cro. Eliz. 205. 1 Roll. Abr. 411.

for life. For, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold, (*s*) because the estate is capable to last forever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A, B and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law or repugnant* to the nature of the estate, are void. In any of which cases if they [*157] be conditions *subsequent,* that *is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he alienes in fee; that then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. (*t*)

(*s*) Co. Litt. 42. (*t*) Co. Litt. 206.

But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed. (*u*)

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are:

III. Estates held *in vadio*, in *gage*, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l. per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower. (*w*) But *mortuum vadium*, a dead pledge, or *mortgage* (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.*, 200*l.*) *and grants him an estate in fee, on [*158] condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may reenter on the estate so granted in pledge; or, as is now

(*u*) *Ibid.* (*w*) *Ibid.* 205.

the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor: in this case, the land, which is so put in pledge, is by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage.(*x*) But as it was formerly a doubt,(*y*) whether, by taking such estate in fee, it did not become liable to the wife's dower, and other incumbrances, of the mortgagee (though that doubt has been long ago overruled by our courts of equity),(*z*) it therefore became usual to grant only a long term of years by way of mortgage with condition to be void on re-payment of the mortgage-money; which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.(*)

(*x*) Litt. § 332.

(*y*) Ibid. § 357. Cro. Car. 191.

(*z*) Hardr. 466.

(*) There are two parts to a mortgage, the conveyance and the defeasance. These are usually embraced in the same instrument, which is executed by the mortgagor alone, and conveys the land at the same time that it specifies the condition on which the conveyance shall be defeated. But sometimes they are executed separately, in which case the mortgagor executes the conveyance, and the mortgagee executes and delivers

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes ab-

to the mortgagor an instrument of defeasance. A deed absolute in form without any written defeasance is nevertheless a mortgage if given to secure a pre-existing debt, and resort may be had to the surrounding circumstances to determine whether that was the real purpose or not. And in some of the states it is held that a parol agreement contemporaneous with the giving of a deed may be shown in order to establish that a deed was to be a mortgage only. See authorities collected in Emerson *v.* Atwater, 7 Mich. 12. And see Hodges *v.* Ins. Co., 8 N. Y. 416; Despard *v.* Walbridge, 15 *id.* 374.

The vendor of real estate who has not been fully paid the purchase money has a lien upon the land for the payment, in the absence of any express contract on the subject, unless he has received security for the payment, or the circumstances are such as to preclude the idea that the parties expected such a lien to exist. White *v.* Williams, 1 Paige, 502; Sears *v.* Smith, 2 Mich. 243; Chilton *v.* Braiden's Admr., 2 Black, 458; Tobey *v.* McAlister 9 Wis. 463; Neil *v.* Kinney, 11 Ohio, N. S. 58; Boos *v.* Ewing, 17 Ohio, 500; Manly *v.* Slason, 21 Vt. 277; Lusk *v.* Hopper, 3 Bush. 179; Piedmont, &c. Co. *v.* Green, 3 W. Va. 54; Boynton *v.* Champlin, 42 Ill. 57. This lien continues so long as the land remains in the hands of the purchaser, and would also follow it in the hands of one who received a conveyance with knowledge of the lien or without consideration. See Mackreth *v.* Symmons, 15 Ves. 329, and notes thereto in 1 Lead. Cas. in Equity. The lien is enforced in equity as an equitable mortgage. This lien does not appear to exist in Kansas. Simpson *v.* Mundee, 3 Kansas, 172.—Note to Cooley's Blackstone.

solute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose; and though a mortgage be thus forfeited, and the *estate absolutely vested in the mort-
[*159] gagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1,000*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption:* and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium.* But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be forever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages,(*a*) the

(*a*) Stat. 4 and 5 W. & M. c. 16.

fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor. (*b*) But by statute 7 Geo. II, c. 20, after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin *or corporal tradition of the lands, the [*160] gage or pledge of lands was good unless possession was also delivered to creditor; *"si non sequator ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet;"* for which the reason given is, to prevent subsequent and fraudulent pledges of the same land: *"cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari.* (*c*) And the frauds which have arisen since the exchange of

(*b*) *Pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur, creditori. At eam, quæ sine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus. Inst. l.* 4, *t.* 6, § 7.

(*c*) *l.* 10, *c.* 8.

these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

IV. A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant,* and *statute staple;* which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I, *de mercatoribus,* and thence called a statute merchant; the other pursuant to the statute 27 Edw. III, c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns,(*d*) from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debts may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, ac-

(*d*) See Book I, c. 8.

knowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII, c. 6, amended by 8 Geo. I, c. 25, which directs such recognizances to be enrolled and certified into chancery. But these by the Statute of Frauds, 29 Car. II, c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrollment, which is ordered to be marked on the record.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called, an *estate by *elegit*. What an *elegit* is, and why so called, will be explained in the [*161] third part of these Commentaries. At present I need only mention that it is the name of a writ, founded on the statute (*e*) of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid: and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade

(*e*) 13 Edw. I, c. 18.

and commerce, than for any other consideration. Before the statute of *quia emptores,*(*f*) it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2, permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year) (*g*) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner.

I shall conclude what I had to remark on these estates, by statute merchant, statute staple, and *elegit,* with the observation of Sir Edward Coke.(*h*) "These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds;" (which makes them an exception to the general rule) "because though they may hold an estate of inheritance, or for life, *ut liberum tenementum,* until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though to recover their estates, they shall have the same remedy (by assize) *as* a tenant of the freehold shall have,(*i*) yet it is but the *similitude of a free-
[*162] hold, and *nullum simile est idem.*" This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason

(*f*) 18 Edw. I. (*g*) 13 Edw. I. (*h*) 1 Inst. 42,43.

(*i*) The words of the statute *de mercatoribus* are, "*puisse porter bref de novele disseisine, auxi sicum de franktenements.*"

why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts if recovered would belong. For upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors: (*k*) because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

(*k*) Co. Litt. 42.

CHAPTER XI.

OF ESTATES IN POSSESSION, REMAINDER AND REVERSION.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment,* when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates therefore with respect to this consideration, may either be in *possession,* or in *expectancy:* and of expectancies there are two sorts; one created by the act of the parties, called a *remainder;* the other by act of law, and called a *reversion.*

I. Of estates in *possession* (which are sometimes called estates *executed,* whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*), there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

II. An estate then in *remainder,* may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. *As if a [*164] man seized in fee-simple granteth lands to A for twenty years, and, after the determination of the said term, then to B and his heirs forever: here A is tenant for years, remainder to B in fee. In the first place, an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee.(*a*) They are indeed different *parts,* but they constitute only one *whole;* they are carved out of one and the same inheritance; they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life; and after the determination of B's estate for life, it be limited to C and his heirs forever; this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions; there is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or por-

(*a*) Co. Litt. 143.

tions of one entire inheritance; and if there were a hundred remainders, it would still be the same thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple:(*b*) because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath to him the *whole* of the estate; a remainder therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with [*165] all *the remainders expectant thereon, is only one fee-simple: as 40*l.* is part of 100*l.* and 60*l.* is the remainder of it; wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than, after the whole 100*l.* is appropriated, there can be any residue subsisting.

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

1. And, first, there must necessarily be some particular estate precedent to the estate in remainder.(*c*) As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula,* of the inheritance; the residue

(*b*) Plowd. 29. Vaugh. 269. (*c*) Co. Litt. 49. Plowd. 25.

or remainder of which is granted over to another. The necessity of creating this particular estate, in order to make a good remainder, arises from this plain reason: that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law,(*d*) to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro;* but it ought to take effect presently either in possession or remainder;(*e*) because at *common law no free- [*166] hold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance

(*d*) Raym. 151. (*e*) 5 Rep. 94.

to B of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A; hereby the livery of the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seized of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti,* though to be occupied and enjoyed *in futuro.*

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over.(*f*) For an estate at will is of a nature so slender and precarious that it is not looked upon as a portion of the inheritance; and a portion must first be

(*f*) 8 Rep. 75.

taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made:(*g*) or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract,* if the tenant for years be a party to it, yet it is void by way of *remainder:* for it is a separate, independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken.(*h*) And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also:(*i*) as where the particular estate is an estate for the life of a person not *in esse;*(*k*) or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate;(*l*) in either of these cases the remainder over is void. [*167]

2. A second rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate.(*m*) As, where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this which in-

(*g*) Dyer, 18.
(*h*) Raym. 151.
(*i*) Co. Litt. 298.
(*k*) 2 Roll. Abr. 415.
(*l*) 1 Jon. 58.
(*m*) Litt. § 671. Plowd. 25.

duces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be even limited on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void. (*n*) Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law. (*o*)

[*168] *3. A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. (*p*) As, if A be tenant for life, remainder to B in tail: here B's remainder is vested in him, at the creation of the particular estate to A for life: or if A and B be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies

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(*n*) Litt. § 60. (*o*) Co. Litt. 49.

(*p*) Plowd. 25. 1 Rep. 26.

before B hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and even supposing that B should afterwards have a son, he shall not take by this remainder; for as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. (*q*) And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby: (*r*) the thing supported must fall to the ground, if once its support be severed from it.

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed,* whereby a present interest passes to the party though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the [*169] *particular estate is spent. As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat or set aside.

(*q*) 1 Rep. 138. (*r*) 3 Rep. 21.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event;* so that the particular estate may chance to be determined, and the remainder never take effect. (*s*)

First, they may be limited to a dubious and uncertain *person*. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail, and A died without issue born, but leaving his wife *enceinte,* or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular estate determined before there was any person *in esse,* in whom the remainder could vest. (*t*) But, to remedy this hardship, it is enacted by statute 10 and 11 Wm. III, c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is al-

(*s*) *Ibid.* 20.

(*t*) Salk. 228. 4 Mod. 282.

lowed to vest in them, while yet in their mother's womb. (*u*)

This species of contingent remainders to a person not in being, must however be limited to some one, that may by common possibility, or *potentia propinqua,* be *in esse* at or before the particular estate determines. (*w*) As if an estate be *made to A [*170] for life, remainder to the heirs of B; now, if A dies before B, the remainder is at end; for during B's life he has no heir, *nemo est hæres viventis:* but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua,* and therefore allowed in law. (*x*) But a remainder to the right heirs of B (if there be no such person as B *in esse*), is void. (*y*) For here there must be two contingencies happen; first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which makes it *potentia remotissima,* a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name. (*z*) A limitation of a remainder to a bastard

(*u*) See Book I, p. 130. (*w*) 2 Rep. 51.
(*x*) Co. Litt. 378. (*y*) Hob. 33. (*z*) 5 Rep. 51.

before it is born, is not good: (*a*) for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

A remainder may also be contingent where the person to whom it is limited is fixed and certain but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with the remainder to B in fee; here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is forever gone; but if A dies first, the remainder to B becomes vested.

[*171] *Contingent remainders of either kind, if they amount to a freehold cannot be limited on an estate for *years,* or any other particular estate, *less* than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void; (*b*) but if granted to A *for life,* with like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it

(*a*) Cro. Eliz. 509. (*b*) 1 Rep. 130

must vest in the particular tenant, else it can vest nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders may be *defeated* by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. (*c*) Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest; the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he by that means defeats the remainder in tail to his son: for his son not being *in esse,* when the particular estate determined, the remainder could not then vest: and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If therefore his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a *particular [*172] estate in possession, sufficient to support the re-

(*c*) *Ibid.* 66, 135.

mainders depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent council, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life:(*d*) and when after the restoration, these gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtleties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however, omit, that in devises by last will and testament (which being often drawn up when the party is *inops consilii,* are always more favored in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice), in these devises, I say, remainders may be created in some measure contrary to the rules before

(*d*) See Moor. 486. 2 Roll. *Abr.* 797, pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

laid down; though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises,* or devises hereafter to be executed.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency.* It differs from a remainder in three very material points; 1. That it needs not any *particular estate to support it. 2. That by it a fee-simple, or other [*173] less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

1. The first case happens when a man devises a future estate to arise upon a contingency; and, till that con-

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(*) [The student will now be prepared to understand the celebrated rule of law commonly called *The Rule in Shelly's Case,* on account of the following distinct announcement of it which occurred in that case. 1 Rep. 104, a. "It is a rule of law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, that always in such case 'the heirs' are words of limitation of the estate, and not words of purchase." And this is a strict rule of law which cannot be prevented by any expression of intention to the contrary. Thus, if a limitation is made to Jane Wood *for life,* remainder to B for life, remainder to C in tail, remainder to the heirs of Jane Wood; she takes an estate for life with the ultimate remainder to *herself* in fee; and such remainder descending to her heir, would be descendible from him to the heirs *ex parte materna.*]—Note to Cooley's Blackstone.

tingency happens, does not dispose of the fee-simple, but leaves it to descend to his heirs at law. As if one devises land to a feme sole and her heirs, upon her day of marriage: here is in effect a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise.(*e*) For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do, if it passes at all), therefore it may commence *in futuro;* because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in præsenti*. And, since it may thus commence *in futuro,* there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.(*f*)

2. By executory devise, a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs; but if he dies before the age of twenty-one, then to B and his heirs; this remainder, though void in deed, is good by way of executory devise.(*g*) But, in both these species of executory

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(*e*) 1 Sid. 153. (*f*) Cro. Jac. 593. (*g*) 2 Mod. 289.

devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a *moderate term
of years, for courts of justice will not indulge [*174] even wills, so as to create a perpetuity which the law abhors:(*h*) because by perpetuities (or the settlement of an interest, which shall go in succession prescribed, without any power of alienation), (*i*) estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme covert, as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this has been decreed to be a good executory devise.(*k*)

3. By executory devise a term of years may be given to one man for his life and afterwards limited over in remainder to another, which could not be done by deed; for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years.(*l*) And, at first, the courts were tender, even in

(*h*) 12 Mod. 287. 1 Vern. 164.
(*i*) Salk. 229.
(*k*) Fort. 232.
(*l*) Rep. 95.

the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place: (*m*) for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held, (*n*) that the devisee for life hath no power of aliening the term, so as to bar the remainder-man: yet, in order to prevent the danger of perpetuities, it was settled, (*o*) that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be **in esse* [*175] during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest: and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee. (*p*) *

(*m*) Bro. tit. *chattels*, 23. Dyer, 74.

(*n*) Dyer, 358. 8 Rep. 96.

(*o*) 1 Sid. 451.

(*p*) Skinn. 341. 3 P. Wms. 258.

(*) [Peter Thelusson, Esq., an eminent merchant, devised the bulk of an immense property to trustees for the purpose of accumulation during the lives of three sons, and of all their sons who should be living at the time of his death, or be born in due time afterwards, and during the life of the survivor of them. Upon the death of this last, the fund is directed to be divided into three shares, one to the eldest male lineal descendant of each of his three sons; upon the failure of such a descendant, the share

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another

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to go to the descendants of the other sons; and upon the failure of all such descendants, the whole to go to the sinking fund. When he died he had three sons living, who had four sons living, and two twin sons were born soon after. Upon calculation it appeared that upon the death of the survivor of these nine, the fund would probably exceed nineteen millions; and upon the supposition of only one person to take, and a minority of ten years, that it would exceed thirty-two millions. It is evident that this extraordinary will was strictly within the limits laid down in the text; and it was accordingly sustained both in the court of chancery and in the house of lords. See 4 Ves. Jun. 227; 11 *id.* 112; 1 New Rep. 357.

This will, however, occasioned the passing of the 39 and 40 Geo. III, c. 98, by which are prohibited any settlements of property, real or personal, for entire or partial accumulation for any longer term than the life of the settler, the period of twenty-one years from his death, the minority of any person or persons living, or *en ventre sa mere* at the time of his death, or the minority of any persons who would be beneficially entitled to the profits under the settlement, if of full age. Any direction to accumulate beyond this, except for the purpose of paying debts, raising portions for children, or in case of the produce of timber, is declared void, and the profits are directed to be paid to such person as would have been entitled if there were no such direction. In moving the judgment of the lords in Thelusson's case, Lord Eldon, Ch., said of this act, which had passed between the decisions of the original case and the appeal, "That act was rather a matter of surprise upon me, and perhaps it is not one of the wisest legislative measures. But it must be remembered that it expressly alters what it takes to have been the former law, and confines the power of accumulation to twenty-one years; but if your lordships were to exercise the power of accumulation in all

species, which is created by the act and operation of the law itself, and this is called a reversion.

III. An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. (*q*) Sir Edward Coke (*r*) describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed, or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsenti,* though taking effect *in futuro.*

The doctrine of reversions is plainly derived from the feudal constitution. For when a feud was granted to a

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the cases allowed by the act, the accumulation would be enormous." 1 N. R. 397.]

For remarks upon Thelusson's Case see 4 Kent, 284. In the United States there are statutes which preclude the absolute power of alienation being suspended except during the periods and for the purposes which they specify; and to these the reader is referred.—Note to Cooley's Blackstone.

(*q*) Co. Litt. 22. (*r*) 1 Inst. 142.

man for life, or to him and his issue male, rendering either rent or other services; then, on his death or the failure of issue male, the feud was determined, and resulted back to the *lord or proprietor, to [*176] be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty, however, results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. (*s*) The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words; but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso:* for the maxim of law is, *"accessorium non ducit, sed sequitur, suum principale."* (*t*)

These *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one seized of a paternal estate in fee makes a lease for life, with remainder to himself and his heirs,

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(*s*) Co. Litt. 143. (*t*) *Ibid.* 151, 152.

this is properly a mere reversion, (*u*) to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done: (*w*) for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A, reserving rent, with reversion to B, and his heirs, B hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A's estate. (*x*)

[*177] *In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their death, it is enacted by the statute 6 Ann. c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the court of chancery, and order made thereupon), once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, (*y*)

(*u*) Cro. Eliz. 321.
(*w*) 3 Lev. 407.
(*x*) 1 And. 23.
(*y*) 3 Lev. 437.

the less is immediately annihilated; or, in the law phrase, it is said to be *merged,* that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*), there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife.(*z*) An estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee: and the estate-tail, though a less estate, shall not merge in the fee.(*a*) For estates-tail are protected and preserved from merger by the *operation and construction, [*178] though not by the express words, of the statute *de donis:* which operation and construction have probably arisen upon this consideration; that in the common cases of *merger* of estates for life or years by uniting

(*z*) Plowd. 418. Cro. Jac. 275. Co. Litt. 338.
(*a*) 2 Rep. 61. 8 Rep. 74.

with the inheritance, the particular tenant hath the sole interests in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion: therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate.(*b*) But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like:(*c*) it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

(*b*) Cro. Eliz. 302. (*c*) See page 116.

CHAPTER XII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

We come now to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

I. He that holds lands or tenements in *severalty,* or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a *plurality* of tenants.

*II. An estate in *joint-tenancy* is where [*180] lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years or at will. In consequence of such grants an estate is called an estate in joint-tenancy, (*a*) and sometimes an estate in *jointure,* which word as well as the other signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint-estate, which by virtue of the statute 27 Hen. VIII, c. 10, is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower. (*b*)

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire how these estates may be *created;* next, their *properties* and respective *incidents;* and lastly, how they may be *severed* or *destroyed.*

1. The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal

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(*a*) Litt. 277. (*b*) See page 137.

estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

2. The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest,* the unity of *title,* the unity of *time,* and the unity of *possession;* or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

**First,* they must have one and the same *interest.* One joint-tenant cannot be entitled to [*181] one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail.(*c*) But if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance.(*d*) If land be granted to A and B for their lives, and to the heirs of A; here A and B are joint tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty: or if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A hath a several remainder in tail.(*e*) *Secondly,* joint-tenants must also have an unity of *title;* their estate must be created by one and the same act, whether legal or illegal: as by one and the

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(*c*) Co. Litt. 188. (*d*) Litt. § 277. (*e*) *Ibid.* § 285.

same grant, or by one and the same disseisin.(*f*) Joint-tenancy cannot arise by descent or act of law; but merely by purchase or acquisition by the act of the party: and unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. *Thirdly,* there must also be an unity of *time;* their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at an-
[*182] other.(*g*) *Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times:(*h*) because the *use* of the wife's estate was in abeyance and dormant till the inter-

(*f*) *Ibid.* § 278. (*g*) Co. Litt. 188.
(*h*) Dyer 340. 1 Rep. 101.

marriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in joint-tenancy there must be an unity of *possession*. Joint-tenants are said to be seized *per my et per tout* by the *half* or *moiety*, and by *all:* that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*.(*i*) They have not, one of them a seisin of one-half or moiety, and the other of the other moiety; neither can one be exclusively seized of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety.(*j*) And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they, cannot take the estate by moieties, but both are seized of the entirety, *per tout, et non per my:* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.(*k*)

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure

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(*i*) Litt. § 288. 5 Rep. 10.

(*j*) *Quilibet totum tenet et nihil tenet: scilicet, totum in communi, et nihil separatim per se.* Bract. *l.* 5, *tr.* 5 *c.* 26.

(*k*) Litt. § 665. Co. Litt. 187. Bro. *Abr. t. cui in vita*, 8. 2 Vern. 120. 2 Lev. 39.

to both, in respect of the joint reversion.(*l*) If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate.(*m*) On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them:(*n*) and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both.(*o*) In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other.(*p*) But if two or more joint-tenants be seized of an advowson, and they present different clerks, the bishop may refuse to admit either; because neither joint-tenant hath a several right of patronage, but each is [*183] seized of *the whole; and if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate.(*q*) Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land;(*r*) for each has an equal right to enter on any part of it. But one joint-tenant is not

(*l*) Co. Litt. 214. (*m*) *Ibid.* 192. (*n*) *Ibid.* 49.
(*o*) *Ibid.* 319, 364. (*p*) *Ibid.* 195. (*q*) *Ibid.* 185.
(*r*) 3 Leon. 262.

capable by himself to do any act which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds:(*s*) and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2, c. 22.(*t*) So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver,(*u*) yet now by the statute 4 Ann. c. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy.

From the same principle also arises the remaining grand incident of joint-estates; viz.: the doctrine of *survivorship:* by which when two or more persons are seized of a joint-estate of inheritance, for their own lives, or *per auter vie,* or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate.(*w*) This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants *is not only equal or similar, but [*184] also is one and the same. One has not origin-

(*s*) 1 Leon. 234.
(*t*) 2 Inst. 403.
(*u*) Co. Litt. 200.
(*w*) Litt. §§ 280, 281.

ally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole; and, therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors (*x*) the *jus accrescendi,* because the right upon the death of one joint-tenant accumulates and increases to the survivors: or, as they themselves express it, *"pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem."* And this *jus*

(*x*) Bracton, *l.* 4, *tr.* 3, *c.* 9, § 3. Fleta, *l.* 3, *c.* 4.

accrescendi ought to be mutual; which I apprehend to be one reason why neither the king,(*y*) nor any corporation,(*z*) can be a joint-tenant with a private person. For here is no mutuality; the private person has not even the remotest chance of being seized of the entirety, by benefit of survivorship; for the king and the corporation can never die.

3. *We are, lastly, to inquire how an estate [*185] in joint-tenancy may be *severed* and *destroyed.* And this may be done by destroying any of its constituent unities. 1. That of *time,* which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession.* For joint-tenants being seized *per my et per tout,* everything that tends to narrow that interest, so that they shall not be seized throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants: for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason, also, the right of survivorship is by such separation destroyed.(*a*) By common law all the joint-tenants might agree to make partition of the lands, but

(*y*) Co. Litt. 190. Finch. L. 83.

(*z*) 2 Lev. 12.

(*a*) Co. Litt. 188, 193.

one of them could not compel the other so to do:(*b*) for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statutes 31 Hen. VIII, c. 1, and 32 Hen. VIII, c. 32, joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands. (*c*) 3. The jointure may be destroyed by destroying the unity of *title*. As if one joint-tenant alienes and conveys his estate to a third person: here the joint tenancy is severed, and turned into tenancy in common;(*d*) for the grantee and the remaining joint tenant hold by different titles (one derived from the original, the other from the subsequent grantor), though, till partition made, the unity of possession continues. But a devise of one's share by will [*186] *is no severance of the jointure: for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other (*e*) is already vested. (*f*) 4. It may also be destroyed by destroying the

(*b*) Litt. § 290.

(*c*) Thus, by the civil law, *nemo invitus compellitur ad communionem.* (*Ff.* 12, 6, 26, § 4.) And again, *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest.* (*Ff.* 10, 3, 8.)

(*d*) Litt. § 292.

(*e*) *Jus accrescendi præfertur ultimæ voluntati.* Co. Litt. 185.

(*f*) Litt. § 287.

unity of *interest.* And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure;(*g*) though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate.(*h*) In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure:(*i*) for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship, or *jus accrescendi,* the same instant ceases with it.(*k*) Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship:(*l*) and if one of three joint-tenants release his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure;(*m*) for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the

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(*g*) Cro. Eliz. 470.

(*h*) 2 Rep. 60. Co. Litt. 182.

(*i*) Litt. §§ 302, 303.

(*k*) *Nihil de re accrescit ei, qui nihil in re quando jus accresceret habet.* Co. Litt. 188.

(*l*) Litt. § 294. (*m*) *Ibid.* § 304.

estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

[*187] *In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety. (*n*) And therefore if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture: (*o*) for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate: (*p*) for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

(*n*) 1 Jones 55. (*o*) 4 Leon. 237. (*p*) Co. Litt. 252.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law or particular custom. By common law: as where a person seized in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and these co-heirs are then called *coparceners;* or for brevity, *parceners* only.(*q*) Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, etc.(*r*) And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.(*s*)

*The *properties* of parceners are in some respects like those of joint-tenants; they having [*188] the same unities of *interest, title* and *possession.* They may sue and be sued jointly for matters relating to their own lands;(*t*) and the entry of one of them shall in some cases enure as the entry of them all.(*u*) They cannot have an action of trespass against each other; but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste;(*w*) for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the Eighth, joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other

(*q*) Litt. §§ 241, 242.
(*r*) *Ibid.* § 265.
(*s*) Co. Litt. 163.
(*t*) *Ibid.* 164.
(*u*) *Ibid.* 188, 243.
(*w*) 3 Inst. 403.

points. 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchased lands, to hold to them and their heirs, they are not parceners, but joint-tenants;(*x*) and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature: whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate of coparcenary. For if a man had two daughters, to whom his estate descends in coparcenary, and one died before the other; the surviving daughter and the heir of the other, or when both are dead, their two heirs are still parceners;(*y*) the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an *unity,* have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety;(*z*) and of course there is no *jus accrescendi,* or survivorship between them; for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if *the possession be once [*189] severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener

(*x*) Litt. § 254.
(*y*) Co. Litt. 164, 174.
(*z*) *Ibid.* 163, 164.

alienes her share, though no partition be made, then are the lands no longer held in *coparcenary,* but in *common.*(*a*)

Parceners are so called, saith Littleton,(*b*) because they may be constrained to make *partition.* And he mentions many methods of making it;(*c*) four of which are by consent, and one by compulsion. The first is where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger.(*d*) And the reason given is, that the former privilege of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est*

(*a*) Litt. § 309. (*b*) § 241.
(*c*) §§ 243 to 264. (*d*) Co. Litt. 166. 3 Rep. 22.

electio. The fourth method is, where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanneled, and assign to each of the parceners her part in [*190] severalty.(*e*) But there are some things *which are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson.(*f*)

There is yet another consideration attending the estate in coparcenary: that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor (which we may remember was a species of estates tail, freely given by a relation for advancement of his kinswoman in marriage,(*g*) in this case, if lands descend from the *same* ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in

(*e*) By statute 8 and 9 Wm. III, c. 31, an easier method of carrying on the proceedings on a writ of partition of lands held either in joint tenancy, parcenary, or common, than was used at the common law, is chalked out and provided.

(*f*) Co. Litt. 164, 165. (*g*) See page 115.

frankmarriage in equal proportion with the rest of the lands descending.(*h*) This mode of division was known in the law of the Lombards;(*i*) which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* With us it is denominated bringing those lands into *hotch-pot:*(*k*) which term I shall explain in the very words of Littleton:(*l*) "it seemeth that this word *hotch-pot*, is in English a pudding: for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifery metaphor our ancestors meant to inform us (*m*) that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage: and if she did not choose to put her lands into hotch-pot, she was presumed to be sufficiently *provided for, and the rest of [*191] the inheritance was divided among her other sisters. The law of hotch-pot took place then only when the other lands descending from the ancestor were fee-simple; for, if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotch-pot.(*n*) And the reason is, because lands descending in fee-simple are distributed,

(*h*) Bracton, *l.* 2, *c.* 34. Litt. §§ 266 to 273.
(*i*) *l.* 2, *t.* 14, *c.* 15. (*k*) Britton, *c.* 72.
(*l*) § 267. (*m*) Litt. § 268. (*n*) *Ibid.* § 274.

by the policy of law, for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands descending in tail, are not distributed by the operation of the law, but by the designation of the giver, *per formam doni;* it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotch-pot; for no others are looked upon in law as given for the advancement of the women, or by way of marriage portion.(*o*) And, therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotch-pot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

The estate in coparcenary may be *dissolved,* either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously.(*p*) This tenancy, therefore, happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of titles and of

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(*o*) *Ibid.* 275. (*p*) *Ibid.* 292.

time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no *necessary unity of interest; one may hold by descent, the other by [*192] purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own; otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation;(*q*) and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles and conveyances.(*r*) If one of two parceners alienes, the

(*q*) *Ibid.* 293. (*r*) *Ibid.* 295.

alienee and the remaining parcener are tenants in common;(*s*) because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two men, or two *women,* and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman,* and the heirs of their bodies begotten:(*t*) and in this, and the like cases, their issue shall be tenants in common; because they must claim by different titles, one as heir of A, and [*193] the other as heir of B; and those two not titles by *purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed; but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favor joint-tenancy rather than tenancy in common;(*u*) because the divisible services issuing from land (as rent, etc.) are not divided, nor the entire services (as fealty) multiplied by joint-tenancy, as they must necessarily be upon a tenancy in common. Land

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(*s*) *Ibid.* 309. (*t*) *Ibid.* 283. (*u*) Salk. 392.

given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common; (*w*) and, if one grants to another *half* his land, the grantor and grantee are also tenants in common: (*x*) because, as has been before (*y*) observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally,* is said to be a joint-tenancy; (*z*) because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition; and an estate given to A and B, *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy (*a*) (for it implies no more than the law has annexed to that estate, *viz.:* divisibility), (*b*) yet in *wills* it is certainly a tenancy in common, (*c*) because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common *is meant to be created, to [*194] add express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common, and not as joint-tenants.*

As to the *incidents* attending a tenancy in common:

(*w*) Litt. § 298. (*x*) *Ibid.* 299. (*y*) See p. 182.
(*z*) Poph. 52. (*a*) 1 Eq. Cas. Abr. 291.
(*b*) 1 P. Wms. 17. (*c*) 3 Rep. 39. 1 Vent. 32.

tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII and William III, before mentioned, (*d*) to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore, the same as appertain to joint-tenants merely upon that account; such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2, c. 22, and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate; (*e*) though, if one actually turns the other out of possession, an action of ejectment will lie against him. (*f*) But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest (such as joining or being joined in actions, (*g*) unless in the case where some entire or indivisible thing is to be recovered), (*h*) these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

Estates in common can only be dissolved two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty: 2. By making partition between the several

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(*d*) Pages 185 and 189. (*e*) Co. Litt. 199.
(*f*) *Ibid.* 200. (*g*) Litt. § 311. (*h*) Co. Litt. 197.

tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates.*

CHAPTER XIII.

OF THE TITLE TO THINGS REAL, IN GENERAL.

The foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein; I now come to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

A title is thus defined by Sir Edward Coke (*a*)—*Titulus est justa causa possidendi id quod nostrum est:* or, it is the means whereby the owner of lands hath the just possession of his property.

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

I. The lowest and most imperfect degree of title consists in the mere *naked possession,* or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin,* being a deprivation of that actual seisin, or

(*a*) 1 Inst. 345.

corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of *the heir, or after the death of a particular tenant and be- [*196] fore the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrong-doer has only a mere naked possession, which the rightful owner may put an end to by a variety of legal remedies, as will more fully appear in the third book of these Commentaries. But in the mean time, till some act be done by the *rightful* owner to devest this possession and assert his title, such actual possession is, *prima facie,* evidence of a legal title in the possessor; and it may, by *length of time,* and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good.

II. The next step to a good and perfect title is the *right of possession,* which may reside in one man, while the actual possession is not in himself, but in another. For if a man be disseised, or otherwise kept out of possession, by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two

sorts: an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus if the disseisor, or other wrong-doer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to devest this apparent right by mere entry or other act of his own, but only by an action at law: (*b*) for, until the contrary be proved by legal demonstration, the law will rather presume the right [*197] to *reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favored the right of descent; in order that there might be a person always upon the spot to perform the feudal duties and services; (*c*) and therefore when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feudal court. But if he, who has the actual right of possession, puts in his claim, and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seized, he

(*b*) Litt. § 385. (*c*) Gilb. Ten. 18.

will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of, viz.:

III. The mere *right of property,* the *jus proprietatis,* without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right, jus merum;* and the estate of the owner is in such cases said to be totally divested, and *put to a right.* (*d*) A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession: *for the law presumes that either he had a good right originally, in virtue of which [*198] he entered on the lands in question, or that since such his entry he has procured a sufficient title; and,

(*d*) Co. Litt. 345.

therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession,* independent of the right of *property:* for the law presumes *prima facie* that the ancestor would not disinherit, or attempt to disinherit, his heirs, unless he had power to do so; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by showing the absolute right of property to reside in another person. The heir, therefore, in this case has only a *mere right,* and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action (that is, such wherein the right of possession only, and not that of property, is contested), and the other party hath indeed in himself the right of property, this is now turned to a *mere right;* and upon proof thereof in a subsequent action denominated a writ of right, he shall recover his seisin of the lands.

Thus, if a disseisor turns me out of possession of my

lands, he thereby gains a *mere naked possession,* and I still retain the *right of possession,* and *right of property.* If the disseisor dies, and the land descend to his son, the son gains an *apparent* right of *possession;* but I still retain the *actual* right both of *possession* and *property.* If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of possession,* and I retain *nothing but the *mere right of property.* And [*199] even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of *sixty* years. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the *right of possession,* and the son hath only the *mere right* or *right of property.* And hence it will follow, that one man may have the *possession,* another the *right of possession,* and a third the *right of property.* For if a tenant in tail enfeoffs A in fee simple, and dies, and B disseises A; now B will have the *possession,* A the *right of possession,* and the issue in tail the *right of property:* A may recover the possession against B; and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

IV. A complete title to lands, tenements and hereditaments. For it is an ancient maxim of the law, (*e*) that no title is completely good, unless the right of pos-

(*e*) Mirr. *l.* 2, *c.* 27.

session be joined with the right of property; which right is then denominated a double right, *jus duplicatum,* or *droit droit.* (*f*) And when to this double right the actual possession is also united, when there is, according to the expression of Fleta, (*g*) *juris et seisinæ conjunctio,* then, and then only, is the title completely legal.

(*f*) Co. Litt. 266. Bract. *l.* 5, *tr.* 3, *c.* 5.
(*g*) *l.* 3, *c.* 15, § 5.

COMMENTARIES

ON

THE LAWS OF ENGLAND.

OF PRIVATE WRONGS.

PART III.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

At the opening of these Commentaries (*a*) municipal law was in general defined to be, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." (*b*) From hence, therefore, it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned (*c*) the distribution of these collections into two general heads; under the former of which we have already considered the *rights* that were defined and established, and

(*a*) Introduc. § 2.

(*b*) *Sanctio justa, jubens honesta, et prohibens contraria.* Cic. 11. *Philipp.* 12. Bract. *l*, 1, c. 3.

(*c*) Book I, ch. 1.

under the latter are now to consider the *wrongs* that are forbidden, and redressed by the laws of England.

[*2] *In the prosecution of the first of these enquiries, we distinguished rights into two sorts: first, such as concern, or are annexed to, the persons of men, and are then called *jura personarum,* or *the rights of persons;* which, together with the means of acquiring and losing them, composed the first book of these Commentaries: and secondly, such as a man may acquire over external objects, or things unconnected with his person, which are called *jura rerum,* or *the rights of things:* and these, with the means of transferring them from man to man, were the subject of the second book. I am now, therefore, to proceed to the consideration of *wrongs;* which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary, that before we entered at all into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is *jus* being necessarily prior to what may be termed *injuria,* and the definition of *fas* precedent to that of *nefas.*

Wrongs are divisible into two sorts or species: *private wrongs,* and *public wrongs.* The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries:* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appella-

tions of *crimes* and *misdemeanors*. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will be reserved till the next or concluding volume.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined, and wrongs prohibited. This remedy is therefore *principally* to be sought by application to these *courts of justice; that is, by civil suit or action. For which reason our chief employment in this book will be to consider the redress of private wrongs, by *suit* or *action* in courts. But as there are certain injuries of such a nature, that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and, to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law;* and, thirdly, that which arises from *suit* or *action* in courts, which consists in a conjunction of the other two, the act of the parties cooperating with the act of law. [*3]

And, *first,* of that redress of *private* injuries, which

is obtained by the *mere* act of the *parties*. This is of two sorts: first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is,

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or *any* of these his relations,*be forcibly attacked in his person or property,

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* In the defence of one's self, or any member of his family, a man has a right to employ all necessary violence, even to the taking of life. Shorter *v.* People, 2 N. Y. 193; Yates *v.* People, 32 N. Y. 509; Logue *v.* Commonwealth, 38 Penn. St. 265; Pond. *v.* People, 8 Mich. 150; Maher *v.* People, 24 Ill. 241. But except where a forcible felony is attempted against person or property, he is always to avoid such lamentable consequences if possible, and he cannot justify standing up and resisting to the death when the assailant might have been avoided by retreat. People *v.* Sullivan, 7 N. Y. 396. But when a man is assaulted in his dwelling, he is under no obligation to retreat; his house is his castle, which he may defend to any extremity. And this means not simply the dwelling-house proper; whatever at the common law is within the curtilage is entitled to the same protection. Pond *v.* People, 8 Mich. 150. And in deciding what force it is necessary to employ in resisting the assault, a man must act upon the circumstances as they appear to him at the time, and he is not to be held criminal because on a calm survey of the facts afterwards it appears that the force employed was excessive. See the cases cited above; also Henton *v.* State, 24 Texas 454; Schiner *v.* People, 23 Ill. 17; Patten *v.* People, 18 Mich. 314.

it is lawful for him to repel force by force; and the breach of the peace which happens, is chargeable upon him only who began the affray.(*d*) For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connexion) makes it lawful in him to do himself that immediate justice, to which he *is prompted by nature, and [*4] which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay even for homicide itself: but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

In the last case it was held that where a man's dwelling, in which was his mother in feeble health, was assailed by rioters, and he had reason to believe that the noise and threats of the assailants endangered his mother's life, he had the same right to employ force to quell the riot that he would have had to defend his mother against an actual attack upon her person.—Note to Cooley's Blackstone.

(*d*) 2 Roll. Abr. 546. 1 Hawk. P. C. 131.

II. Recaption or *reprisal* is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace.(*e*) The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and, as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these rea-

[*5] sons it is provided, that this natural right of recaption *shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a

(*e*) 3 Inst. 134. Hal. Anal. § 46.

fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering the grounds of a third person, to take him, except he be feloniously stolen;(*f*) but must have recourse to an action at law.

III. As reception is a remedy given to the party himself, for an injury to his *personal* property, so thirdly, a remedy of the same kind for injuries to *real* property, is by *entry* on lands and tenements, when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and like that, too, must be peaceable and without force. There is some nicety required to define and distinguish the cases, in which such entry is lawful or otherwise; it will therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

IV. A fourth species of remedy by the mere act of the party injured, is the *abatement* or removal of *nuisances*. What nuisances are, and their several species, we shall find a more proper place to inquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it.(*g*) If a house or wall is erected so near to mine

(*f*) 2 Roll. Rep. 55, 56, 208. 2 Roll. Abr. 565, 566.
(*g*) 5 Rep. 101. 9 Rep. 55.

that it stops my ancient lights, which is a *private* nuisance, I may enter my neighbor's land, and peaceably pull it down.(*h*) Or if a new gate be erected across the public highway, which is a *common* nuisance, any of the king's subjects passing that way may cut [*6] it down and destroy it.(*i*) *And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distraining* cattle or goods for non-payment of rent, or other duties; or, distraining another's cattle, *damage-feasant,* that is, doing damage, or trespassing, upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage.

As the law of distresses is a point of great use and consequence, I shall consider it with some minuteness: by inquiring, first, for what injuries a distress may be taken; secondly, what things may be distrained; and,

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(*h*) Salk. 459. (*i*) Cro. Car. 184.

thirdly, the manner of taking, disposing of, and avoiding distresses.

1. And, first, it is necessary to premise, that a distress,(*j*) *districtio,* is the taking a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury, for which a distress may be taken, is that of non-payment of rent. It was observed in a former book,(*k*) that distresses were incident by the common law to every *rent-service,* and by particular reservation to *rent-charges* also; but not to *rent-seck,* till the statute 4 Geo. II, c. 28, extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it down as an universal principle, *that a distress may be taken for any [*7] kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do suit to the lord's court,(*l*) or other certain personal service,(*m*) the lord may distrain of common right. 3. For amercements in a court-leet a distress may be had of common right, but not for amercements in a court-baron, without a special prescription to warrant it.(*n*) 4. Another injury, for which distresses may be taken, is where a

(*j*) The thing itself taken by this process, as well as the process itself, is in our law-books very frequently called a distress.

(*k*) Book II, ch. 3.

(*l*) Bro. *Abr. tit. Distress,* 15.

(*m*) Co. Litt. 47.

(*n*) Brownl. 36.

man finds beasts of a stranger wandering in his grounds, *damage-feasant;* that is, doing him hurt or damage, by treading down his grass, or the like; in which case the owner of the soil may detain them, till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament (as for assessments made by commissioners of sewers, (*o*) or for relief of the poor,) (*p*) remedy by distress and sale is given; for the particulars of which we must have recourse to the statutes themselves: remarking only, that such distresses (*q*) are partly analogous to the ancient distress at common law, as being repleviable and the like; but more resembling the common law process of execution, by seizing and selling the goods of the debtor under a writ of *fieri facias,* of which hereafter.

2. Secondly; as to the things which may be distrained, or taken in distress, we may lay it down as a general rule that all chattels personal are liable to be distrained, unless particularly protected or exempted. Instead, therefore of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reason of their particular exemptions. (*r*) And, 1. As every thing which is distrained is presumed to be the property of the wrongdoer, it will follow that such things wherein no man can have an absolute
[*8] and valuable property (as dogs, cats, rabbits, and *all animals *feroe naturoe*) cannot be distrained.

(*o*) Stat. 7 Ann. c. 10.
(*p*) Stat. 43 Eliz. c. 2.
(*q*) 1 Burr. 539.
(*r*) Co. Litt. 47.

Yet if deer (which are *feroe naturoe*) are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent.(*s*) Whatever is in the personal use or occupation of any man, is for the time privileged and protected from any distress; as an axe with which a man is cutting wood, or a horse while a man is riding him. But horses drawing a cart, may (cart and all) be distrained for rent-arrere; and also, if a horse, though a man be riding him, be taken *damage-feasant,* or trespassing in another's grounds, the horse (notwithstanding his rider) may be distrained and led away to the pound.(*t*) Valuable things in the way of trade shall not be liable to distress. As a horse standing in a smith shop to be shoed, or in a common inn; or cloth at a tailor's house; or corn sent to a mill or market. For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent: for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the chattels are distrained,

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(s) Davis *v.* Powell, *C. B. Hill.* 11 *Geo. II.*

(t) 1 Sid. 440.

so that he cannot render them when called upon. With regard to a stranger's beasts which are found upon the tenant's land, the following distinctions are however taken. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent-arrere by the landlord.(*u*) So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed
[*9] through his negligence.(*v*) But if the lands were not *sufficiently fenced so as to keep out cattle, the landlord cannot distrain them, till they have been *levant* and *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have lain down and rose up to feed; which in general is held to be one night at least: and then the law presumes, that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds, without the negligence or default of the owner; in this case, though the cattle may have been *levant* and *couchant*, yet they are not distrainable for rent, till actual notice is given to the owner that they are there, and he neglects to remove them:(*w*) for the law will not suffer the landlord to take advantage of his own or his tenant's wrong. 4. There are also

(*u*) Cro. Eliz. 549. (*v*) Co. Litt. 47.
(*w*) Lutw. 1580.

other things privileged by the ancient common law; as a man's tools and utensils of his trade, the axe of a carpenter, the books of a scholar, and the like: which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. So, beasts of the plough *avaria carucae,* and sheep, are privileged from distress at common law;(*x*) while dead goods or other sorts of beasts, which Bracton calls *catalla otiosa,* may be distrained. But as beasts of the plough may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions.(*y*) And perhaps the true reason why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its non-payment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress.(*z*)

5. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was distrained: for which reason milk, fruit and the like, cannot be distrained, a distress at *common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, anciently, sheaves or shocks of corn could not be distrained, because some damage must [*10]

(*x*) Stat. 51 Hen. III, st. 4, *de districtiones scaccaru.*

(*y*) 1 Burr. 589. (*z*) *Ibid.* 588.

needs accrue in their removal, but a cart loaded with corn might; as that could be safely restored. But now by statute 2 W. and M. c. 5, corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained, as well as other chattels. 6. Lastly, things fixed to the freehold may not be distrained; as caldrons, windows, doors and chimney-pieces: for they savour of the realty. For this reason also corn growing could not be distrained; till the statute 11 Geo. II, c. 19 empowered landlords to distrain corn, grass or other products of the earth, and to cut and gather them when ripe.

Let us next consider, thirdly, how distresses may be taken, disposed of or avoided. And first, I must premise, that the law of distresses is greatly altered within a few years last past. Formerly, they were looked upon in no other light than as a mere pledge or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage-feasant,* and for other causes, not altered by act of parliament; over which the distrainor has no other power than to retain them till satisfaction is made. But distresses for rent-arrere being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made in the present century; which have much altered the common law, as laid down in our ancient writers.

In pointing out, therefore, the methods of distraining,

I shall in general suppose the distress to be made for rent; and remark, where necessary, the differences between such distress, and one taken for other causes.

*In the first place then all distresses must be made *by day* unless in the case of *damage-feasant;* an exception being there allowed, lest the beasts should escape before they are taken. (*a*) And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but now, (*b*) if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress. If the lessor does not find sufficient distress on the premises, formerly he could resort nowhere else; and, therefore, tenants who were knavish made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords. But now (*c*) the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days thereafter, unless they have been *bona fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrain the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. The landlord [*11]

(*a*) Co. Litt. 142. (*b*) Stat. 8 Ann. c. 14.
(*c*) Stat. 8 Ann. c. 14. 11 Geo. II, c. 19.

might not formerly break open a house, to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door; (*d*) and now (*e*) he may, by the assistance of the peace-officer of the parish, break open in the daytime any place whither the goods have been fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once; and not for part at one time and part at another. (*f*) But if he distrains for the whole, and there is not sufficient [*12] on the premises, or he happens *to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete his remedy. (*g*)

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. III, c. 4, if any man takes a great or unreasonable distress, for rent-arrere, he shall be heavily amerced for the same. As if (*h*) the landlord distrains two oxen for twelve-pence rent; the taking of *both* is an unreasonable distress; but if there were no other distress

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(*d*) Co. Litt. 161. Comberb. 17.

(*e*) Stat. 11 Geo. II, c. 19.

(*f*) 2 Lutw. 1532.

(*g*) Cro. Eliz. 13. Stat. 17 Carr. II, c. 7. 1 Burr. 590.

(*h*) 2 Inst. 107.

nearer the value to be found, he might reasonably have distrained *one* of them; but for homage, fealty, or suit and service, as also for parliamentary wages, it is said that no distress can be excessive. (*i*) For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge, for an action of trespass is not maintainable upon this account, it being no injury at the common law. (*j*)

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distrained must in the first place be carried to some pound, and there impounded by the taker. But, in their way thither, they may be *rescued* by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue. (*k*) But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law. (*l*)

A pound (*parcus,* which signifies any inclosure) is either pound-*overt,* that is, open overhead; or pound-*covert,* that is, close. By the statute 1 and 2 P. & M.

(*i*) Bro. *Abr. t. assise,* 291, *prerogative,* 98.
(*j*) 1 Ventr. 104. Fitzgibb. 85. 1 Burr. 590.
(*k*) Co. Litt. 160, 161.
(*l*) Co. Litt. 47.

c. 12, no distress of cattle can be driven out of
[*13] the hundred where it is taken, *unless to a pound-overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II, c. 19, which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises, upon which a distress is taken, into a pound, *pro hac vice,* for securing of such distress. If a live distress, of animals, be impounded in a *common* pound-overt, the owner must take notice of it at his peril; but if in any *special* pound-overt, so constituted for this particular purpose, the distrainor must give notice to the owner: and in both these cases, the owner, and not the distrainor, is bound to provide the beasts with food and necessaries. But if they are put in a pound-covert, in a stable or the like, the landlord or distrainor must feed and sustain them.(*m*) A distress of household goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distrainor must answer for the consequences.

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held,(*n*) that the distrainor is not at liberty to work or use a distrained beast.

(*m*) *Ibid.* (*n*) Cro. Jac. 148.

And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded, till the owner makes satisfaction; or contests the right of distraining, by replevying the chattels. To *replevy* (*replegiare,* that is to take back the pledge) is, when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession, upon giving good security to try the right of taking it in a suit at law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainor. This is called a replevin, of which more will be said hereafter. At present I shall only observe, that, as a distress is at common *law only [*14] in nature of a security for the rent or damages done, a replevin answers the same end to the distrainor as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him,* yet if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainor. But for a debt due to the crown, unless paid within forty days, the distress was always salable at common law. (*o*) And for an amercement imposed at a court-leet, the lord may also sell the distress: (*p*) partly because, being the king's court of record, its process partakes of the

(*o*) Bro. *Abr. t. distress,* 71. (*p*) 8 Rep. 41.

royal prerogative;(*q*) but principally because it is in the nature of an execution to levy a legal debt. And so, in the several statute-distresses before mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by several acts of parliament,(*r*) in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security; the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself. And, by this means, a full and entire satisfaction may now be had for rent in arrere, by the mere act of the party himself, viz.: by distress, the remedy given at common law; and sale consequent thereon, which is added by act of parliament.

Before I quit this article, I must observe, that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of [*15] proceeding: for if any *one irregularity was committed, it vitiated the whole, and made the distrainors trespassers *ab initio*.(*s*) But now by the statute 11 Geo. II, c. 19, it is provided, that, for any

(*q*) Bro. *Ibid.* 12 Mod. 330.

(*r*) 2 W. & M. c. 5. 8 Ann. c. 14. 4 Geo. II, c. 28. 11 Geo. II, c. 19.

(*s*) I Ventr. 37.

unlawful act done, the whole shall not be unlawful, or the parties trespassers *ab initio:* but that the party grieved shall only have an action for the real damage sustained, and not even that, if tender of amends is made before any action is brought.

VI. The seizing of heriots, when due on the death of a tenant, is also another species of self-remedy; not much unlike that of taking cattle or goods in distress. As for that division of heriots, which is called heriot-service, and is only a species of rent, the lord may distrain for this, as well as seize, but for heriot-custom (which Sir Edward Coke says (*t*) lies only in *prender,* and not in *render*) the lord may seize the identical thing itself, but cannot distrain any other chattel for it. (*u*) The like speedy and effectual remedy, of seizing, is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, deodands, and the like; all which the person entitled thereto may seize, without the formal process of a suit or action. Not that they are debarred of this remedy by action; but have also the other and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature, as might be out of the reach of the law before any action could be brought.

These are the several species of remedies which may be had by the *mere act* of the *party injured.* I shall next briefly mention such as arise from the *joint act of all the parties* together. And these are only two, *accord* and *arbitration.*

(*t*) Cop. § 25. (*u*) Cro. Eliz. 590. Cro. Car. 260.

I. Accord is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar of all actions upon this account. As if a man contract *to build a house or deliver a horse, and fail in it; this is an injury for which the sufferer may have his remedy by action, but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action.(*w*) By several late statutes (particularly 11 Geo. II, c. 19, in case of irregularity in the method of distraining, and 24 Geo. II, c. 24, in case of mistakes committed by justices of the peace), even *tender* of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.

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II. Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators;* who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as *umpire,* (*imperator,* or *impar,*) (*x*) to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an *award.* And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judg-

(*w*) 9 Rep. 79.

(*x*) Whart. *Angl. sacr.* i, 772. Nicols. Scot. Hist. libr. ch. 1, *prope finem.*

ment of a court of justice.(*y*) But the right of real property cannot thus pass by a mere award:(*z*) which subtilty in point of form (for it is now reduced to nothing else) had its rise from feudal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet, doubtless, an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators *or umpire therein named.(*a*) And experience having [*17] shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them as well in controversies where causes are depending, as in those where no action is brought: enacting by statute 9 and 10 Wm. III, c. 15, that all merchants and others, who desire to end any controversy, suit, or quarrel, (for which there is no other remedy but by personal action or suit in equity), may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of any of

(*y*) Brownl. 55. 1 Freem. 410.

(*z*) 1 Roll. Abr. 242. 1 Lord Raym. 115.

(*a*) Append. No. III, § 6.

the king's courts of record, and may insert such agreement in their submission, or promise, or condition of the arbitration-bond: which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive: and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award shall be set aside, for corruption or other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And, in consequence of this statute, it is now become a considerable part of the business of the superior courts, to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt, as is awarded for disobedience to those rules and orders, which are issued by the courts themselves.

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

The remedies for private wrongs, which are effected by the mere operation of law, will fall within a very narrow compass; there being only two instances of this sort that at present occur to my recollection: the one that of *retainer,* where a creditor is made executor or administrator to his debtor; the other in the case of what the law calls a *remitter.*

I. If a person indebted to another makes his creditor or debtee his executor, or if such a creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree.(*a*)* This is a remedy by the mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as a representative of the deceased, to recover that which is due to him in his own private capacity: but having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of

(*a*) 1 Roll. Abr. 922. Plowd. 543. See book II, page 511.

*This is not the law in the United States. Debts of equal degree are paid ratably, and the executor in his accounting is allowed for no payment to himself beyond his just proportion.—Note to Cooley's Blackstone.

law, applied to that particular purpose. Else, [*19] by being made executor, *he would be put in a worse condition than all the rest of the world besides. For, though a ratable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy; so that the creditor who first commences his suit is entitled to a preference in payment; it follows that as the executor can commence no suit, he must be paid the last of any, and, of course, must lose his debt in case the estate of his testator should prove insolvent, unless he be allowed to retain it. The doctrine of *retainer* is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion.(*b*) Nor shall an executor of his own wrong be in any case permitted to retain.(*c*)

II. Remitter is where he who hath the true property

(*b*) Viner. *Abr. t. executors, D.* 2.

(*c*) 5 Rep. 30.

or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title. (*d*) The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one: and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent. (*e*)

As if A disseizes B, that *is, turns him out of [*20] possession, and dies, leaving a son C; hereby the estate descends to C the son of A, and B is barred from entering thereon till he proves his right in an action; now if afterwards C, the heir of the disseizor, makes a lease for life to D, with remainder to B, the disseizee for life, and D dies; hereby the remainder accrues to B, the disseizee: who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law *remitted,* or in of his former and surer estate. (*f*) For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of property.

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted.

(*d*) Litt. § 659.

(*e*) Co. Litt. 358. Cro. Jac. 489.

(*f*) Finch, L. 194. Litt. § 683.

For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right.(*g*) Therefore is to be observed, that to every remitter there are regularly these incidents; an ancient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be *cast upon* the tenant, not gained by his own act or folly. The reason given by Littleton (*h*) why this remedy, which operates silently, and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article; because otherwise he who hath right would be deprived of all remedy. For as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action to establish his prior right. And for this cause the law doth adjudge him in by remitter; that is, in such plight as if he had lawfully recovered the same land by suit. For, as Lord Bacon observes,(*i*) the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsa re valet, si culpa absit.* But there shall be no *remitter to a right, for which the party has no remedy by action:(*k*) as if the issue in tail be barred by the fine or warrant of his ancestor, and the freehold is afterward cast upon him; he shall not be remitted to

[*21]

(*g*) Co. Litt. 348, 350.
(*h*) § 661.
(*i*) Elem. r. 9.
(*k*) Co. Litt. 349.

his estate tail:(*l*) for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As, therefore, the issue in tail could not by any action have recovered his ancient estate, he shall not recover it by remitter.

And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced, as not to make it eligible, or in some cases even possible, to apply for redress in the usual and ordinary methods to the courts of public justice.

(*l*) Moor. 115. 1 Andr. 286.

CHAPTER III.

OF COURTS IN GENERAL.

The next, and principal, object of our inquiries is the redress of injuries by *suit in courts:* wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter,(*a*) the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice; but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of reception does not debar me from my action of trover or detinue:

(*a*) Ch. 1.

I may either enter on the lands, on which I have a right of entry, or may demand possession by a real action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent, or have an action of debt, at my own *option; if I do not distrain my neighbor's [*23] cattle *damage-feasant,* I may compel him by action of trespass to make me a fair satisfaction: if a heriot, or a deodand, be withheld from me by fraud or force, I may recover it though I never seised it. And with regard to accords and arbitrations, these, in their nature, being merely an agreement of compromise, most indisputably suppose a previous right of obtaining redress some other way: which is given up by such agreement. But as to remedies by the mere operation of law, those are indeed given, because no remedy *can* be ministered by suit or action, without running into the palpable absurdity of a man's bringing an action against himself: the two cases wherein they happen being such wherein the only possible legal remedy would be directed against the very person himself who seeks relief.

In all other cases it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded. And in treating of these remedies by suit in courts, I shall pursue the following method: *first,* I shall consider the nature and several species of the courts of justice; and, *secondly,* I shall point out in which of these courts, and in what manner, the proper remedy may be had for any private injury, or, in other words,

what injuries are cognizable, and how redressed, in each respective species of courts.

First, then, of courts of justice. And herein we will consider, *first*, their nature and incidents in general; and then, the several species of them, erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered.(*b*) And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow [*24] that all courts of justice which are *the medium by which he administers the laws, are derived from the power of the crown.(*c*) For, whether created by act of parliament, or letters patent, or subsisting by prescription (the only methods by which any courts of judicature(*d*) can exist), the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance,

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(*b*) Co. Litt. 58.

(*c*) See Book I, ch. 27.

(*d*) Co. Litt. 260.

others upon appeal and by way of review. All these in their turn will be taken notice of in their respective places: and I shall therefore here only mention one distinction, that runs throughout them all, viz.: that some of them are courts *of record,* others *not of record.* A court of record is that, where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary.(*e*) And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity,(*f*) and therefore no other court hath authority to fine or imprison; so that the very erection *of a new [*25] jurisdiction with the power of fine or imprisonment makes it instantly a court of record.(*g*) A court not of record is the court of a private man; whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow subjects. Such are the courts-baron incident to every manor, and other in-

(*e*) Co. Litt. 260. (*f*) Finch, L. 231.
(*g*) Salk. 200. 12 Mod. 388.

ferior jurisdictions: where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s, nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant. (*h*)

In every court there must be at least three constituent parts, the *actor, reus,* and *judex;* the *actor,* or plaintiff, who complains of an injury done; the *reus,* or defendant who is called upon to make satisfaction for it; and the *judex,* or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and, by its officers, to apply the remedy. It is also usual in the superior courts to have attorneys and advocates, or counsel, as assistants.

An attorney at law answers to the *procurator,* or proctor, of the civilians and canonists. (*i*) And he is one who is put in the place, stead, or *turn* of another, to manage his matters of law. Formerly every suitor was obliged to appear in person to prosecute or defend his suit (according to the old Gothic constitution), (*k*) unless by special license under the king's letters pat-

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(*h*) 2 Inst. 311.

(*i*) Pope Boniface VIII, in 6 *Decretal, l,* 3, *t,* 16, § 3, speaks of "*procuratoribus, qui in aliquibus partibus* attornati *nuncupantur.*"

(*k*) Stiernhook *de jure Goth. l.* 1, c. 6.

ent. (*l*) This is still the law in criminal cases. And an idiot cannot to this day appear by attorney, but in person, (*m*) for he hath not discretion to enable him to appoint *a proper substitute: and upon his being brought before the court in so defenceless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest. (*n*) But as in the Roman law, *"cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, coeperunt homines per procuratores litigare,"* (*o*) so with us upon the same principle of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is statute Westm. 2 c. 10, that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps ; they are admitted to the execution of their office by the superior courts of Westminster-hall ; and are in all points officers of the respective courts of which they are admitted ; and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted, and sworn an attorney of that particular court : an attorney of the court of king's bench cannot practice in the court of common pleas ; nor *vice versa*. To practice in the court of chancery it is also necessary to be

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(*l*) F. N. B. 25.
(*m*) F. N. B. 27.
(*n*) Bro. *Abr. t. idiot*, 1.
(*o*) *Inst.* 4 *tit.* 10.

admitted a solicitor therein : and by the statute 22 Geo. II, c. 46, no person shall act as an attorney at the court of quarter sessions, but such as has been regularly admitted in some superior court of record. So early as the statute 4 Henry IV, c. 18, it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes (*p*) have laid them under farther regulations.

Of advocates, or (as we generally call them) counsel, there are two species or degrees; barristers, and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns [*27] of court ; (*q*) and are in our old books *styled apprentices, *apprenticii ad legem,* being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing ; at which time, according to Fortescue, (*r*) they might be called to the state and degree of serjeants, or *servientes ad legem.* How ancient and honorable this state and degree is, with the form, splendour, and profits attending it, hath been so fully displayed by many learned writers, (*s*) that it need not be here enlarged on. I

(*p*) 3 Jac. I, c. 7. 12 Geo. I, c. 29. 2 Geo. II, c. 23. 22 Geo. II, c. 46. 23 Geo. II, c. 26.

(*q*) See Book I, introduc. § 1.

(*r*) *De LL.* c. 50.

(*s*) Fortesc. *ibid.* 10 Rep. pref. Dudg. *Orig. Jurid.* To which may be added a tract by the late Sergeant Wynne, printed in 1765, entitled "Observations touching the antiquity and dignity of the degree of sergeant at law."

shall only observe, that serjeants at law are bound by a solemn oath (*t*) to do their duty to their clients and that by custom (*u*) the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench; the original of which was probably to qualify the *puisne* barons of the exchequer to become justices of assize, according to the exigence of the statute of 14 Edw. III, c. 16. From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney, and solicitor general. The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, who was made so *honoris causa,* without either patent or fee; (*w*) so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles II. (*x*) These king's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci,* among the Romans. For they must not be employed in any cause against the crown without special license; in which restriction they agree with the advocates of the fisc: (*y*) but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign: for, excepting some peculiar causes,

(*t*) 2 Inst. 214.
(*u*) Fortesc. c. 50.
(*w*) See his letters, 256.
(*x*) See his life by Rogers North, 37.
(*y*) *Cod.* 2, 9, 1.

the fiscal advocates were not permitted to be at
[*28] all concerned *in private suits between subject and subject. (z) A custom has of late years prevailed of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction: whereby they are entitled to such rank and pre-audience (a) as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general), (b) rank promiscuously with the king's

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(z) *Ibid.* 2, 7, 13.

(a) Pre-audience in the courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence which usually obtains among the practisers:

1. The king's premier serjeant (so constituted by special patent). (7)
2. The king's ancient serjeant, or the eldest among the king's serjeants. (7)
3. The king's advocate general.
4. The king's attorney-general. (7)
5. The king's solicitor-general. (7)
6. The king's serjeants.
7. The king's counsel, with the queen's attorney and solicitor.
8. Serjeants at law.
9. The recorder of London.
10. Advocates of the civil law.
11. Barristers.

In the courts of exchequer two of the most experienced barristers, called the *post*-man and the *tub*-man (from the places in which they sit) have also a precedence in motions.

(b) Seld, tit. *hon.* 1, 6, 7.

counsel, and together with them sit within the bar of the respective courts ; but receive no salaries, and are not sworn ; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the court of common pleas, where only serjeants are admitted) may take upon them the protection and defence of any suitors, whether plaintiff or defendant ; who are therefore called their *clients*, like the dependents upon the ancient Roman orators. Those indeed practiced *gratis,* for honour merely, or at most for the sake of gaining influence : and so likewise it is established with us, (*c*) that a counsel can maintain no action for his fees ; which are given, not as *locatio vel conductio,* but as *quiddam honorarium;* not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation : (*d*) as is also laid down with regard to advocates in the civil law, (*e*) whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, *or about 80*l* of [*29] English money. (*f*) And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honourable professions), it hath been holden that a counsel is not answerable for any matter by

(*c*) Davis pref. 22. 1 Ch. Rep. 38. (*d*) Davis, 23.
(*e*) *Ff.* 11, 6, 1. (*f*) Tac. *ann. l.* 1, 11, 7.

him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions if it be impertinent to the cause in hand, he is then liable to an action from the party injured. (*g*) And counsel guilty of deceit or collusion are punishable by the statute Westm. 1, 3 Edw. I, c. 28, with imprisonment for a year and a day, and perpetual silence in the courts; a punishment still sometimes inflicted for gross misdemeanors in practice. (*h*)

(*g*) Cro. Jac. 90.

(*h*) Sir T. Raym. 376.

CHAPTER IV.

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

We are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. And these are, either such as are of public and general jurisdiction throughout the whole realm ; or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts ; the universally established courts of common law and equity ; the ecclesiastical courts ; the courts military ; and courts maritime. And, first, of such public courts as are courts of common law and equity.

The policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom ; wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbours and friends. These little courts, however, communicated with others of a larger jurisdiction, and those with others of a still greater power ; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as, by reason

of their weight and difficulty, demanded a more
[*31] solemn discussion. *The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record ; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy ; being equally similar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards, and to that which was established in the Jewish republic by Moses. In Mexico each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination; and then it was remitted to the supreme court of the empire, established in the capital, and consisting of *twelve* judges. (*a*) Peru, according to Garcilasso de Vega (an historian descended from the ancient Incas of that country), was divided into small districts containing *ten* families each, all registered and under one magistrate ; who had authority to decide little differences and punish petty crimes. Five of these composed a higher class of *fifty* families ; and two of these last composed another, called a *hundred.* Ten hundreds constituted the largest division, consisting of a *thousand* families ; and each division had its separate judge or magistrate, with a proper degree of subordination. (*b*)

(*a*) Mod. Un. Hist. xxxviii, 469.

(*b*) Mod. Un. Hist. xxxix, 14.

In like manner we read of Moses, that, finding the sole administration of justice too heavy for him, he "chose able men out of all Israel, such as feared God, men of truth, hating covetousness; and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens; and they judged the people at all seasons; the hard causes they brought unto Moses; but every small matter they judged themselves." (*c*) These inferior courts, at least the name and form of them, still continue in our legal constitution: but as the superior courts of record have in practice obtained a concurrent original jurisdiction with these; and as there is, besides, a power of removing plaints or actions thither from all the inferior jurisdictions; upon these accounts (amongst others) it has happened that [*32] *these petty tribunals have fallen into decay, and almost into oblivion; whether for the better or the worse, may be matter of some speculation, when we consider on the one hand the increase of expense and delay, and on the other the more able and impartial decision, that follow from this change of jurisdiction.

The order I shall observe in discoursing on these several courts, constituted for the redress of *civil* injuries (for with those of a jurisdiction merely *criminal* I shall not at present concern myself), will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet, (with regard to each particular court) confined to very

(*c*) Exod. c. 18.

narrow limits ; and so ascending gradually to those of the most extensive and transcendent power.

I. The lowest, and at the same time the most expeditious, court of justice known to the law of England, is the court of *piepoudre, curia pedis pulverizati ;* so called from the dusty feet of the suitors : or, according to Sir Edward Coke, (*d*) because justice is there done as speedily as dust can fall from the foot;—upon the same principle that justice among the Jews was administered in the gate of the city, (*e*) that the proceedings might be the more speedy, as well as public. But the etymology given us by a learned modern writer (*f*) is much more ingenious and satisfactory ; it being derived, according to him, from *pied puldreaux,* (a pedlar, in old French), and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record, incident to every fair and market ; of which the steward of him who owns or has the toll of the market, is the judge ; and its jurisdiction extends to administer justice for all commercial injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined, within the compass of one and the same day, unless the fair continues longer. The court hath cog-
[*33] nizance of *all matters of contract that can possibly arise within the precinct of that fair or market ; and the plaintiff must make oath that the cause

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(*d*) 4 Inst. 272. (*e*) Ruth. c. 4.
(*f*) Barrington's observat. on the stat. 337.

of action arose there.(*g*) From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster ; (*h*) which are now also bound by the statute 19 Geo. III, c. 70, to issue writs of execution, in aid of its process, after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction ; which may possibly occasion the revival of the practice and proceedings in these courts, which are now in a manner forgotten. The reason of their original institutions seems to have been, to do justice expeditiously among the variety of persons that resort from distant places to a fair or market ; since it is probable that no other inferior court might be able to serve its process, or execute its judgments, on both or perhaps either of the parties ; and therefore unless this court had been erected, the complainant must necessarily have resorted, even in the first instance, to some superior judicature.

II. The *court-baron* is a court incident to every manor in the kingdom, to be holden by the steward within said manor. This court-baron is of two natures : (*i*) the one is a customary court, of which we formerly spoke (*k*) appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only. The other, of which we now speak, is a court

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(*g*) Stat. 17 Edw. IV. c. 2. (*h*) Cro. Eliz. 773.
(*i*) Co. Litt. 58.
(*k*) Book 2, ch. 4, ch. 6 and ch. 22.

of common law, and it is the court of the barons, by which name the freeholders were sometimes anciently called : for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the register than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, viz.: the freeholders' court, was composed of the lord's tenants, who were the *pares* of each other, and were bound by their feudal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks : and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass on the case or [*34] the like, where the debt or damages do not *amount to forty shillings : (*l*) which is the same sum, or three marks, that bounded the jurisdiction of the ancient Gothic courts in their lowest instance, or *fierding-courts,* so called, because four were instituted within every superior district or hundred. (*m*) But the proceedings on a writ of right may be removed into the county court by a precept from the sheriff called a *tolt,* (*n*) *"quia tollit atque eximit causam e curia baronum."* (*o*) And the proceedings in all other actions may be removed into the superior courts by the king's writs of

(*l*) Finch, 248.

(*m*) Stiernhook, *de jure Goth. l.* 1, c. 2.

(*n*) F. N. B. 3, 4. See Appen. No. 1, § 2.

(*o*) 3 Rep. pref.

pone, (*p*) *or accedas ad curiam,* according to the nature of the suit.(*q*) After judgment given, a writ also of *false judgment* (*r*) lies to the courts at Westminster to rehear and review the case, and not a writ of *error;* for this is not a court of record: and therefore in some of these writs of removal, the first direction given is to cause the plaint to be recorded, *recordari facias loquelam.*

III. A hundred-court is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here also the judges, and the steward the registrar, as in the case of a court-baron. It is likewise no court of record: resembling the former in all points, except that in point of territory it is of greater jurisdiction.(*s*) This is said by Sir Edward Coke to have been derived out of the county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time;(*t*) but its institution was probably coeval with that of hundreds themselves, which were formerly observed (*u*) to have been introduced, though not invented, by Alfred, being derived from the polity of the ancient Germans. The *centeni,* we may remember, were the principal inhabitants of a district

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(*p*) See Append. No. 1, § 3.
(*q*) F. N. B. 4, 70. Finch. L. 444, 445.
(*r*) F. N. B. 18.
(*s*) Finch, L. 243. 4 Inst. 267.
(*t*) 2 Inst. 71. (*u*) Book I, p. 116.

composed of different villages, originally in
[*35] number a *hundred,* but afterwards only *called
by that name; (*v*) and who probably gave the same denomination to the district out of which they were chosen. Cæsar speaks positively of the judicial power exercised in *their* hundred-courts and courts-baron. "*Principes regionum atque pagorum*" (which we may fairly construe, the lords of hundreds and manors), "*inter suos jus dicunt, controversiasque minuunt.*" (*w*) And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but that of the *centeni,* the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "*Eliguntur in conciliis et principes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt.*" (*x*) This hundred-court was denominated *haereda* in the Gothic constitution. (*y*) But this court, as causes are equally liable to removal from hence as from the common court-baron, and by the same writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal disuse with regard to the trial of actions.

IV. The county court is a court incident to the

(*v*) *Centeni ex singulis pagis sunt, id que ipsum inter suos vocantur; et, quod primo numerus fuit, jam nomen et honor est.* Tac. *de mor.* Germ. c. 6.

(*w*) *De Bell. Gall. l.* 6, c. 22.

(*x*) *De Morib. German.* c. 13.

(*y*) Stiernhook, *l.* 1, c. 2.

jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings. (*z*) Over some of which causes these inferior courts have, by the express words of the statute of Gloucester, (*a*) a jurisdiction totally exclusive of the king's superior courts. For in order to be entitled to sue an action of trespass for goods before the king's justiciars, the plaintiff is directed to make affidavit that the cause of action does really and *bona fide* amount to 40*s.*; which affidavit is now unaccountably disused, (*b*) except in the court of exchequer. The statute, also, 43 Eliz. c. 6, which gives the judges in many personal actions, where the jury assess less damages than 40*s.*, a power to certify the same and *abridge [*36] the plaintiff of his full costs, was also meant to prevent vexation by litigious plaintiffs; who, for purposes of mere oppression, might be inclinable to institute suits in the superior courts for injuries of a trifling value. The county court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies;* which is a writ empowering the sheriff for the sake of dispatch to do the same justice in his county court, as might otherwise be had at Westminster. (*c*) The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders, which are supposed always to attend at the coun-

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(*z*) 4 Inst. 266.
(*a*) 6 Edw. I, c. 8.
(*b*) 2 Inst. 311.
(*c*) Finch, 318. F. N. B. 152.

ty court (which Spelman calls *forum plebeiae justiciae et theatrum comitivae potestatis*), (*d*) is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever be made *in pleno comitatu,* or in full county court. By the statute 2 Edw. VI, c. 25, no county court shall be adjourned longer than for one month, consisting of twenty-eight days. And this was also the ancient usage, as appears from the laws of King Edward the elder; (*e*) "*praepositus* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito; litesque singulas dirimito.*" In those times the county court was a court of great dignity and splendour, the bishop and the earldorman (or earl), with the principal men of the shire sitting therein to administer justice both in lay and ecclesiastical causes. (*f*) But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it. And, in modern times, as proceedings are removable from hence into the king's superior courts, by writ of *pone* or *recordari,* (*g*) in the same manner as from *hundred-courts, and courts-baron; and as the same writ of false judgment may be had, in nature of a

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(*d*) *Gloss v. comitatus.* (*e*) *C.* 11.
(*f*) *LL. Eadgari.* c. 5. (*g*) F. N. B. 70. Finch, 445.

writ of error; this has occasioned the same disuse of bringing actions therein.

These are the several species of common law courts, which, though dispersed universally throughout the realm, are nevertheless of a partial jurisdiction, and confined to particular districts: yet communicating with, and as it were members of, the superior courts of a more extended and general nature; which are calculated for the administration of redress, not in any one lordship, hundred, or county only, but throughout the whole kingdom at large. Of which sort is,

V. The court of *common pleas,* or, as it is frequently termed in law, the court of *common bench.*

By the ancient Saxon constitution, there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes, viz.: the *wittena-gemote,* or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the conquest the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton, (*h*) and other ancient authors *aula regia,* or *aula regis.* This court was composed of the king's great officers of

(*h*) *l.* 3, *tr.* 1, c. 7.

state resident in his palace, and usually attendant on his person: such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar [*38] *business it was to keep the king's seal, and examine all such writs, grants, and letters, as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the *aula regia,* and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue: and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliae;* who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him. (*i*)

(*i*) Spelm. *Gl.* 331, 2, 3. Gilb. His. C. P. Introduc. 17.

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject. Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *magna carta,* and enacts, "that *communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This certain place was established in Westminster-hall, the place where the *aula regis* originally sat, when the king resided in that city ; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a chief with other justices of the common pleas was thereupon appointed ; with jurisdiction to hear and determine all pleas of land, and injuries merely civil, between subject and subject. Which critical establishment of this principal court of *common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood ; and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it.(*j*) This precedent was soon after copied by King Philip the Fair in France, who about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis ; which before used to follow the person of the king wherever he went, and [*39]

(*j*) See Book I, introduc. § 1.

in which he himself used frequently to decide the causes that were there pending; but all were then referred to the sole cognizance of the parliament and its learned judges. (*k*) And thus, also, in 1495 the emperor Maximilian I. fixed the imperial chamber (which before always travelled with the court and household) to be constantly held at Worms, from whence it was afterwards translated to Spire. (*l*)

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of King Henry III. And, in further pursuance of this example, the other several officers of the chief justiciar were under Edward the First (who new-modelled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so prov-

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(*k*) Mod. Un. Hist. xxiii, 396.

(*l*) *Ibid.* xxix, 467.

ident an order, that the great judicial officers were *made to form a check upon each other: [*40] the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: *pleas of the crown,* which comprehend all crimes and misdemeanors, wherein the king (on behalf of the public) is the plaintiff; and *common pleas,* which include all civil actions, depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas: which is a court of record, and is styled by Sir Edward Coke (*m*) the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal pleas between man and man, are likewise here determined; though in most of *them* the king's bench has also a concurrent authority.

The judges of this court are at present (*n*) four in

(*m*) 4 Inst. 99.

(*n*) King James I, during the greater part of his reign, appointed five judges in the courts of king's bench and common pleas, for the benefit of a casting voice in case of a difference in

number, one chief and three *puisne* justices, created by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally, as upon removal from the inferior courts before mentioned. But a writ of error, in the nature of an appeal, lies from this court into the court of king's bench.

[*41] *VI. The court of king's bench (so called because the king used formerly to sit there in person,(*o*) the style of the court still being *coram ipso rege*) is the supreme court of common law in the kingdom; consisting of a chief justice and three *puisne* justices, who are by their office the sovereign conservators of the peace, and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered(*p*) to, determine any cause or motion,

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opinion, and that the circuits might at all times be fully supplied with judges of the superior courts. And, in subsequent reigns, upon the permanent indisposition of a judge, a fifth hath been sometimes appointed. Sir T. Raym. 475.

(*o*) 4 Inst. 73.

(*p*) See book 1, ch. 7. The king used to decide causes in person in the *aula regia*. "*In curia domini regis ipse in propria persona jura decernit.*" (*Dial. de Scacch. l.* 1, § 4.) After its dissolution King Edward I frequently sat in the court of king's bench. (See the records cited, 2 Burr. 151.) And, in later times, James I is said to have sat there in person, but was informed by his judges that he could not deliver an opinion.

but by the mouth of his judges, to whom he hath committed his whole judicial authority. (*q*)

This court, which (as we have said) is the remnant of the *aula regia,* is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes; for which reason all process issuing out of this court in the king's name is returnable *"ubicunque fuerimus in Anglia."* It hath indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown; but might remove with the king to York or Exeter, if he thought proper to command it. And we find that, after Edward I had conquered Scotland, it actually sat at Roxburgh. (*r*) And this movable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are *"capitales, generales, perpetui, et majores; a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores."* (*s*) And it is moreover especially provided in the *articuli super cartas,* (*t*) that the king's chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

*The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, [*42]

(*q*) 4 Inst. 71.
(*r*) M. 20. 21 Edw. I. Hale Hist. C. L. 200.
(*s*) *l*, 3, c. 10.
(*t*) 28 Edw. I, c. 5.

and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes ; the former in what is called the crown-side or crown-office ; the latter in the plea-side of the court. The jurisdiction of the crown-side it is not our present business to consider ; that will be more properly discussed in the ensuing book. But on the plea-side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass, or other injury alleged to be committed *vi et armis ;* of actions of forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud: all of which savour of a criminal nature, although the action is brought for a civil remedy ; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party.(*u*) The same doctrine is also now extended to all actions on the case whatsoever ;(*w*) but no action of debt or detinue, or other mere civil action, can by the *common law* be prosecuted by any subject in this court, by *original* writ out of chancery ; (*x*) though an action of debt, given by *statute,* may be

(*u*) Finch, L. 198. 1 Inst. 23. *Dyversite de courtes c. bank le roy.*

(*w*) F. N. B. 86, 92. 1 Lilly Pract. Reg. 503.

(*x*) 4 Inst. 76. Trye's Jus Filizar. 101.

brought in the king's bench as well as in the common pleas.(*y*) And yet this court might always have held plea of any civil action (other than actions real) provided the defendant was an officer of the court; or in the custody of the marshal, or prison-keeper, of this court; for a breach of the peace or any other offence.(*z*) And, in process of time, it began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages:(*a*) it being surmised that the defendant is arrested for *a supposed trespass, which [*43] he never has in reality committed; and, being thus in the custody, of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury: which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute.(*b*) And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.(*c*) So

(*y*) Carth. 234.

(*z*) 4 Inst. 71.

(*a*) *Ibid.* 72.

(*b*) Thus, too, in the civil law; *contra fictionem non admittitur probatio; quid enim efficeret probatio veritatis, ubi fictio adversus veritatem fingit. Nam fictio nihil aliud est, quam legis adversus veritatem in re possibili ex justa causa dispositio.* (*Gothofred. in Ff.* 22, *t.* 3.)

(*c*) 3 Rep. 30. 2 Roll. Rep. 502.

true it is, that *in fictione juris semper subsistit aequitas.* (*d*) In the present case, it gives the suitor his choice of more than one tribunal, before which he may institute his action; and prevents the circuity and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in this court, which, after a determination in another might ultimately be brought before it on a writ of error.

For this court is likewise a court of appeal, into which may be removed by a writ of error all determinations of the court of common pleas, and of all inferior courts of record in England ; and to which a writ of error lies also from the court of king's bench in Ireland. Yet even this so high and honourable court is not the *dernier resort* of the subject ; for, if he be not satisfied with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted.

VII. The court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also: but I have chosen to consider it in this order, on account of its double capacity, as a court of [*44] law and a court of equity *also. It is a very ancient court of record, set up by William the Conqueror,(*e*) as a part of the *aula regia,*(*f*) though regulated and reduced to its present order by King

(*d*) 11 Rep. 51. Co. Litt. 150.

(*e*) Lamb. *Archeion.* 24. (*f*) Madox, hist. exch. 109.

Edward I; (*g*) and intended principally to order the revenues of the crown, and to recover the king's debts and duties. (*h*) It is called the exchequer, *scacchārium*, from the checked cloth, resembling a chess board, which covers the table there: and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manages the royal revenue, and with which these Commentaries have no concern: and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

The court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three *puisne* ones. These Mr. Selden conjectures (*i*) to have been anciently made out of such as were barons of the kingdom, or parliamentary barons; and thence to have derived their name; which conjecture receives great strength from Bracton's explanation of *magna carta*, c. 14, which directs that the earls and barons be amerced by their peers; that is, says he, by the barons of the exchequer. (*k*) The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belong-

(*g*) Spelm. *Guil.* I, *in cod. leg. vet. apud* Wilkins.
(*h*) 4 Inst. 103-116.
(*i*) Tit. hon. 2, 5, 16.
(*k*) *l.* 3, *tr.* 2, c. 1, § 3.

ing to the crown. So that by their original constitution the jurisdiction of the court of common pleas, king's bench, and exchequer, was entirely separate and distinct: the common pleas being intended to decide all controversies between subject and subject; the king's bench to correct all crimes and misdemeanors that amount to a breach of the peace, the king being then plaintiff, as such offences are in open derogation of the *jura regalia* of his crown; and the exchequer to adjust *and [*45] recover his revenue, wherein the king also is plaintiff, as the withholding and non-payment thereof is an injury to his *jura fiscalia*. But, as by a fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court; so also the king's debtors and farmers, and all accomptants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personalty only is concerned) as are prosecuted in the court of common pleas.

This gives original to the common law part of their jurisdiction, which was established merely for the benefit of the king's accomptants, and is exercised by the barons only of the exchequer, and not the treasurer or

chancellor. The writ upon which all proceedings here are grounded is called a *quo minus* : in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit,* by which he is less able to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland, (*l*) to be confined to such matters only as specially concern the king or his ministers of the exchequer. And by the *articuli super cartas,* (*m*) it is enacted, that no common pleas be thenceforth holden in the exchequer contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accomptant. The surmise of being debtor to the king, is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file *a bill [*46] against another upon a bare suggestion that he is the king's accomptant ; but whether he is so or not is never controverted. In this court on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes: in which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first fruits, and annual tenths. But the chancery of late years obtained a large share in this business.

An appeal from the equity side of this court lies im-

(*l*) 10 Edw. I, c. 11. (*m*) 28 Edw. I, c. 4.

mediately to the house of peers ; but from the common law side, in pursuance of the statute 31 Edw. III, c. 12, a writ of error must be first brought into court of exchequer chamber. And from the determination there had, there lies, in the *dernier resort,* a writ of error to the house of lords.

VIII. The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria,* from the judge who presides here, the lord chancellor or *cancellarius ;* who, Sir Edward Coke tells us, is so termed *a cancellando,* from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction.(*n*) But the office and name of chancellor (however derived) was certainly known to the courts of the Roman emperors: where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state ; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of

(*n*) 4 Inst. 88.

them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner; and, therefore, *when seals came in use, he [*47] had always the custody of the king's great seal.

So that the office of chancellor, or lord keeper, (whose authority by statute 5 Eliz. c. 18, is declared to be exactly the same), is with us at this day created by the mere delivery of the king's great seal into his custody:(*o*) whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord.(*p*) He is a privy counsellor by his office,(*q*) and, according to Lord Chancellor Ellesmere,(*r*) prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel,(*s*) he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks (*t*) *per annum* in the king's books. He is the

(*o*) Lamb. *Archeion.* 56. 1 Roll. Abr. 385.

(*p*) Stat. 31 Hen. VIII. c. 10.

(*q*) Selden, office of lord, chanc. § 3.

(*r*) Of the office of lord chancellor, *edit.* 1651.

(*s*) Madox. hist. of exch. 42.

(*t*) 38 Edw. III. 3 F. N. B. 35, though Hobart (214) extends this value to twenty *pounds.*

general guardian of all infants, idiots, and lunatics ; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises in his *judicial* capacity in the court of chancery ; wherein, as in the exchequer, there are two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

The ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions ; and to hold plea of petitions, *monstrans de droit,* traverses of offices, and the like ; when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. (*u*) On proof of which, as the king can never *be supposed intentionally to do any wrong, the law questions not, but he will immediately redress the injury; and refers that conscientious task to the chancellor, the keeper of his conscience. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party. (*v*) It might likewise hold plea (by *scire facias*) of partitions of land in coparcenery, (*w*) and of dower, (*x*) where any ward of the crown was concerned in interest,

[*48]

(*u*) 4 Rep. 54.

(*v*) 4 Inst. 80.

(*w*) Co. Litt. 171. F. N. B. 62.

(*x*) Bro. *Abr. tit. dower*, 66. Moor. 565.

so long as the military tenures subsisted: as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown;(*y*) and of executions on statutes, or recognizances in nature thereof, by the statute 23 Hen. VIII, c. 6.(*z*) But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury: but must deliver the record *propria manu* into the court of king's bench, where it shall be tried by the country, and judgment shall be there given thereon.(*a*) And when judgment is given in chancery upon demurrer or the like, a writ of error in nature of an appeal lies out of this ordinary court into the court of king's bench:(*b*) though so little is usually done on the common law side of the court, that I have met with no traces of any writ of error(*c*) being actually brought, since the fourteenth year of Queen Elizabeth, A. D. 1572.

In this ordinary, or legal, court is also kept the *officina justitiæ:* out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy, and the like, do is-

(*y*) Bro. *tit. dismes.* 10.

(*z*) 2 Roll. Abr. 469.

(*a*) Cro. Jac. 12. Latch. 112.

(*b*) Year-book, 18 *Edward III*, 25. 17 *Ass.* 24. 29 *Ass.* 47. Dyer, 315. 1 Roll. Rep. 287. 4 Inst. 80.

(*c*) The opinion of Lord Keeper North, in 1682 (1 Vern. 131; 1 Equ. Cas. abr. 129), that no such writ of error lay, and that an injunction might issue against it, seems not to have been well considered.

sue; and for which it is always open to the subject, who may there at any time demand and have *ex* [*49] *debito justitiæ;* any writ that his occasions* may call for. These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of ancient times, originally kept in a hamper *in hanaperio;* and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in *parva baga;* and thence hath arisen the distinction of the *hanaper* office, and *petty bag* office, which both belong to the common law court in chancery.

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country at any time: (*d*) and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans; (*e*) the *jus prætorium,* or discretion of the prætor, being dis-

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(*d*) The *council of conscience,* instituted by John III, king of Portugal, to review the sentence of all inferior courts, and moderate them by equity (Mod. Un. Hist. xxii, 237), seems rather to have been a court of appeal.

(*e*) Thus, too, the parliament of Paris, the court of session in Scotland, and every other jurisdiction in Europe, of which we have any tolerable account, found all their decisions as well upon principles of equity as those of positive law. (Lord Kaims, histor. law tracts, I, 325, 330, princ. of equity, 44.)

tinct from the *leges,* or standing laws, (*f*) but the power of both centred in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. With us, too, the *aula regia,* which was the supreme court of judicature, undoubtedly administered equal justice, according to the rules of both or either, as the case might chance to require; and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For, though equity is mentioned by Bracton (*g*) as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward I, and *treating particularly of courts and their several jurisdictions), [*50] is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems, therefore, probable that, when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council (from whence, also, arose the juris-

(*f*) Thus Cicero: "*Jam illis promissis, non esse standum, quis non videt quoe coactus quis metu quoe deceptus dolo promiserit? quoe quidem pleraque jure praetoria liberantur, nonnulla legibus.*" Offc. *l.* i.

(*g*) *l.* 2, *c.* 7, *fol.* 23.

diction of the court of requests,(*h*) which was virtually abolished by the statute 16 Car. I, c. 10); and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom, not only among our Saxon ancestors, before the institution of the *aula regia,*(*i*) but also after its dissolution, in the reign of King Edward I;(*k*) and, perhaps, during its continuance, in that of Henry II.(*l*)

In these early times, the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who

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(*h*) The matters cognizable in this court, immediately before its dissolution, were "almost all suits, that by colour of equity, or supplication made to the prince, might be brought before him; but originally and properly all poor men's suits, which were made to his majesty by supplication; and upon which they were entitled to have right, without payment of any money for the same." (Smith's Commonwealth, b. 3, c. 7.)

(*i*) *Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde quoeratur apud regem. LL. Edg.* c. 2.

(*k*) Lambard, *Archeion.* 59.

(*l*) Joannes Sarisburiensis (who died A. D. 1182, 26 Hen. II), speaking of the chancellor's office in the verses prefixed to his *polycraticon,* has these lines:

Hic est, qui leges regni cancellat iniquas
Et mandata pii principis aequa facit.

were too much attached to ancient precedents, it is provided by statute, Westm. 2, 13 Edw. I, c. 24, that, whensoever from thenceforth in one case a writ shall be found in the chancery, and in a like case, falling under the same right and requiring like remedy, *no precedent of a writ can be produced, [*51] the clerks in chancery shall agree in forming a new one; and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law,(*m*) lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass on the case to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason and equity of his very case.(*n*) Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending, rather than narrowing, the remedial effects of the writ), might have effectually answered all the purposes of a court of equity;(*o*) except that of obtaining a discovery by the oath of the defendant.

(*m*) A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westm. 2.

(*n*) Lamb. *Archeion.* 61.

(*o*) This was the opinion of Fairfax, a very learned judge in the time of Edward the Fourth. "*Le sub poena* (says he) *ne serroit my cy soventement use come il est ore, si nous attendomus tiels actions sur les cases et mainteinomus le jurisdiction de ceo court, et d'auter courts.*" (Yearbook, 21 *Edw. IV.* 23.)

But when, about the end of the reign of King Edward III, uses of lands were introduced, (*p*) and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established; (*q*) and John Waltham, who was bishop of Salisbury and chancellor to King Richard II, by a strained interpretation of the above-mentioned statute of Westm. 2, devised the writ of *subpœna,* returnable in the court of chancery only, to make the feoffee to uses accountable to his *cestuy que use:* which process was afterwards, extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which, therefore, the chancellor himself is, by statutes 17 Ric. II, c. 6, directed to give damages to the party unjustly aggrieved. But as [*52] the *clergy, so early as the reign of King Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro lœsione fidei,* as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts; (*r*) till checked by the constitutions of Clarendon, (*s*) which declared that, "*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justitia regis:*" therefore probably the

(*p*) See book II, ch. 20.

(*q*) Spelm. *Gloss.* 106. 1 Lev. 242.

(*r*) Lord Lyttelt. Hen. II. b. 3, p. 361, note.

(*s*) 10 Hen. II, c. 15. Speed. 458.

ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new acquired jurisdiction; especially as the spiritual courts continued (*t*) to grasp at the same authority as before in suits *pro læsione fidei,* so late as the fifteenth century, (*u*) till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls, (*w*) that, in the reigns of Henry IV and V, the commons were repeatedly urged to have the writ of *subpœna* entirely suppressed, as being a novelty devised by the subtlety of Chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV, being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute

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(*t*) In 4 Hen. III, suits in court christian *pro loesione fidei* upon temporal contracts were adjudged to be contrary to law. (Fitzh. *Abr. t. Prohibition*, 15.) But in the statute or writ of *circumspecte agatis*, supposed by some to have issued 13 Edw. I, but more probably (3 Pryn. Rec. 336) 9 Edw. II, suits *pro laosione fidei* were allowed to the ecclesiastical courts; according to some ancient copies (Berthelet *stat. antiq.* London 1531, 90. *b;* 3 Pryn. Rec. 336), and the common English translation of that statute, though in Lyndewode's copy (*prov. l.* 2, *t.* 2), and in the Cotton MS. (*Claud.* D. 2), that clause is omitted.

(*u*) Year-book, 2 *Hen. IV.* 10. 11 *Hen. IV*, 88. 38 *Hen. VI*, 29. 20 *Edw. IV.* 10.

(*w*) *Rot. Parl.* 4 *Hen. IV*, Nos. 78 and 110. 3 *Hen. V*, No. 46, cited in Prynne's abr. of Cotton's records, 410, 422, 424, 548. 4 Inst. 83. 1 Roll. Abr. 370, 371, 372.

4 Henry IV, c. 23, whereby judgments at law are declared irrevocable unless by attaint or writ of error, yet his son put a negative at once upon their whole application: and in Edward IV's time, the process by bill and *subpœna* was become the daily practice of the court. (*x*)

*But this did not extend very far: for in the [*53] ancient treatise, entitled *diversite des courtes,* (*y*) supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman: no lawyer having sat in the court of chancery from the times of the chief justices Thorpe and Knyvet, successively chancellors to King Edward III, in 1372 and 1373, (*z*) to the promotion of Sir Thomas Moore by King Henry VIII, in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers, (*a*) or churchmen, (*b*) according as the convenience of the times and the disposition of the

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(*x*) *Rot. Parl.* 14 Edw. *IV*, No. 33 (not 14 *Edw. III.* as cited 1 Roll. Abr. 370, &c).

(*y*) *Tit. Chancery, fol.* 296. Rastell's edit. *A. D.* 1534.

(*z*) Spelm. *Gloss* 111. Dudg. *chron. Ser.* 50.

(*a*) Wriothesly, St. John, and Hatton.

(*b*) Goodrick, Gardiner, and Heath.

prince required, till Sergeant Puckering was made lord keeper in 1592; from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to Lord Ellesmere, when chancellor.(*c*)

In the time of Lord Ellesmere (A.D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law? This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the council, and even a master in chancery, for having incurred a *præmunire,* by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition.(*d*) This matter being brought before the king, was by him referred *to his learned counsel for their [*54] advice and opinion; who reported so strongly in favour of the courts of equity,(*e*) that his majesty gave judgment in their behalf; but not contented with the irrefragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), he chose rather to decide the question by referring it to

(*c*) *Biog. Brit.* 4278.

(*d*) Bacon's Works, IV, 611, 612, 682.

(*e*) Whitelocke of parl. ii. 390. 1 Chan. Rep. Append. 11.

the plenitude of his royal prerogative.(*f*) Sir Edward Coke submitted to the decision,(*g*) and thereby made atonement for his error: but this struggle, together with the business of *commendams* (in which he acted a very noble part) (*h*) and his controlling the commissioners of sewers,(*i*) were the open and avowed causes, (*k*) first of his suspension and soon after of his removal, from his office.

Lord Bacon, who succeeded Lord Ellesmere, reduced

(*f*) "For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences as at any time may and shall arise between our several courts, touching their jurisdiction, and the same to settle and determine as we in our princely wisdom shall find to stand most with our honour," &c. (1 Chanc. Rep. append. 26.)

(*g*) See the entry in the council book, 26 July, 1616. (Biogr. Brit. 1390.)

(*h*) In a cause of the bishop of Winchester, touching a *commendam*, King James, conceiving that the matter affected his prerogative, sent letters to the judges not to proceed in it till himself had been first consulted. The twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law; but upon being brought before the king and council they all retracted and promised obedience in every such case for the future, except Sir Edward Coke, who said "that when the case happened, he would do his duty." (Biogr. Brit. 1388.)

(*i*) See that article in chap. 6.

(*k*) See Lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15 Nov. 1616. (Moore's reports, 828.) Though Sir Edward might probably have retained his seat, if, during his suspension, he would have complimented Lord Villiers (the new favourite) with the disposal of the most lucrative office in his court. (Biogr. Brit. 1391.)

the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I, did little to improve upon his plan; and even after the restoration the seal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the earl of Shaftsbury, who (though a lawyer by education) had never practised at all. Sir Heneage Finch, who succeeded in 1673, *and became afterwards earl of [*55] Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a prevailing genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended and improved by many great men, who have since presided in chancery. And from that time to this

the power and business of the court have increased to an amazing degree.

From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but a definitive judgment: 2. That on writs of error the house of lords pronounces the judgment, on appeals it gives direction to the court below to rectify its own decree.

IX. The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III, c. 12, to determine causes by writs of error from the common law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and common pleas. In imitation of which a second court of exchequer chamber was erected by statute 27 Eliz. c. 8, consisting of the justices of the common pleas, and the barons of the exchequer, before whom writs of error may be [*56] brought to reverse judgments *in certain suits (*l*) originally begun in the court of king's bench. Into the court also of exchequer chamber (which

(*l*) See chap. 25, p. 411.

then consists of all the judges of the three superior courts, and now and then the lord chancellor also), are sometimes adjourned from the other courts such causes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below. (*m*)

From all the branches of this court of exchequer chamber, a writ of error lies to

X. The house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law, committed by the courts below. To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court; and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those

(*m*) 4 Inst. 119. 2 Bulst. 146.

questions upon which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them; since upon their decision all property must finally depend.*

Hitherto may also be referred the tribunal established by statute 14 Edw. III, c. 5, consisting (though now out of use) of one prelate, two earls, and two barons who are to be chosen at every new parliament to hear complaints of grievances and delays of justice in the king's courts, and (with the advice of the chancellor, treasurer and justices of both benches) to give [*57] directions for remedying these *inconveniences in the courts below. This committee seems to have been established, lest there should be a defect of justice for want of a supreme court of appeal, during any long intermission or recess of parliament; for the

*In practice the house of lords, when sitting to hear appeals, is composed only of the "law lords," as they are called; that is, the peers who at the time hold judicial positions or who have heretofore held such positions. Every peer indeed has the right to be present and participate, but it is a right which it not, and could not often with propriety be, asserted, since few except the law lords have any such training as would fit them for the duties to be performed. A quorum of peers must be present, but *three* is a quorum of the house of peers, and two besides the chancellor would be sufficient to constitute this court. If those two should chance to be lay members, and the decree under review be one made by the chancellor himself, his own vote would affirm it, as the lay members would take no part. But usually four or five law lords are present.—Note to Cooley's Blackstone.

statute farther directs, that if the difficulty be so great, that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls and barons, unto the *next* parliament, who shall finally determine the same.

XI. Before I conclude this chapter, I must also mention an eleventh species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; I mean the courts of assize and *nisi prius*.

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are holden only once a year, to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster-hall. These judges of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere;* who were regularly established, if not first appointed, by the parliament of Northampton, A.D. 1176, 22 Hen. II,(*n*) with a delegated power from the king's great court, or *aula regia,* being looked upon as members thereof; and they afterwards made their circuit round the kingdom once in seven

(*n*) Seld. *Jan. l.* 2, § 5. Spelm. *Cod.* 399.

years for the purpose of trying causes.(*o*) They were afterwards directed by *magna carta,* c. 12, to be sent into every county once a year, to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assizes; the most difficult of which they are directed to adjourn into the court of common pleas to be there determined. The itinerant justices were sometimes mere justices of assize [*58] or of dower, or of gaol-delivery, and the like; and *they had sometimes a more general commission to determine all manner of causes, being constituted *justiciarii ad omnia placita:*(*p*) but the present justices of assize and *nisi prius* are more immediately derived from the statute Westm. 2, 13 Edw. I, c. 30, which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By statute 27 Edw. I, c. 4, (explained by 12 Edw. II, c. 3,) assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought; associating to him one knight or other approved man of the county. And, lastly, by statute 14 Edw. III, c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court),

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(*o*) Co. Litt. 293.—*Anno,* 1261, *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis baptiste;—et totus comitatus eos admittere recusavit, quod* septem *anni nondum erant elapsi, postquam justicarii ibidem ultimo-sederunt* (*Annal. Eccl. Wigorn. in Whart. Angl. sacr. I,* 495).

(*p*) *Bract. l.* 3, *tr.* 1, *c.* 11.

or before the chief baron of the exchequer, if he be a man of the law; or otherwise before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's serjeant sworn. They usually make their circuits in the respective vacations after Hilary and Trinity terms; assizes being allowed to be taken in the holy time of lent by consent of the bishops at the king's request, as expressed in statute Westm. 1, 3 Edw. I, c. 51. And it was also usual during the times of popery, for the prelates to grant annual licenses to the justices of assize to administer oaths in holy times: for oaths being of a sacred nature, the logic of those (deluded) ages concluded that they must be of ecclesiastical cognizance.(*q*) The prudent jealousy of our ancestors ordained,(*r*) that no man of law should be judge of assize in his own county, wherein he was born or doth inhabit; and a similar prohibition is found in the civil law,(*s*) which has carried this principle so far that it is equivalent to the crime of sacrilege, for a man to be governor of the province in which he was born, or has any civil connexion.(*t*)

The judges upon their circuits now sit by virtue of five several authorities. 1. The commission of the *peace*.

(*q*) Instances hereof may be met with in the appendix to Spelman's original of the terms, and in Mr. Parker's Antiquities, 209.

(*r*) Stat. 4 Edw. III, c. 2. 8 Ric. II, c. 2. 33 Hen. VIII, c. 24.

(*s*) *Ff.* 1, 22, 3.

(*t*) *C.* 9, 29, 4.

2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol-delivery*. The consideration [*59] of all which belongs properly *to the subsequent book of these Commentaries. But the fourth commission is, 4. A commission of *assize*, directed to the justices and serjeants therein named, to take (together with their associates) assizes in the several counties; that is to take the verdict of a peculiar species of jury, called an assize, and summoned for the trial of *landed* disputes, of which hereafter. The other authority is, 5. That of *nisi prius*, which is a consequence of the commission of *assize*,(*u*) being annexed to the office of those justices by the statute of Westm. 2, 13 Edw. I, c. 30, and it empowers them to try all questions of fact issuing out of the courts of Westminster, that are then ripe for trial by jury. These by the course of the courts (*w*) are usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nisi prius, unless before* the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas term, which saves much expense and trouble. These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward I and II, before mentioned; whereby certain persons (usually the clerk of assize and his

(*u*) Salk. 454.

(*w*) See ch. 23, p. 353.

subordinate officers) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes, &c.; that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *si non omnes;* directing that if all cannot be present, any two of them (a justice or a serjeant being one) may proceed to execute the commission.

These are the several courts of common law and equity, which are of public and general jurisdiction throughout the kingdom. And, upon the whole, we cannot but admire the wise economy and admirable provision of our ancestors, in settling the distribution of justice in a method so well calculated for cheapness, expedition and ease. By the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every *man's own county, hundred, or perhaps [*60] parish. Pleas of freehold, and more important disputes of property, were adjourned to the king's court of common pleas, which was fixed in one place for the benefit of the whole kingdom. Crimes and misdemeanors were to be examined in a court by themselves: and matters of the revenue in another distinct jurisdiction. Now indeed, for the ease of the subject and greater dispatch of causes, methods have been found to open all the three superior courts for the redress of private wrongs; which have remedied many inconveniences, and

yet preserved the forms and boundaries handed down to us from high antiquity. If facts are disputed, they are sent down to be tried in the country by the neighbours; but the law, arising upon those facts, is determined by the judges above: and, if they are mistaken in point of law, there remain in both cases two successive courts of appeal, to rectify such their mistakes. If the rigour of general rule does in any case bear hard upon individuals, courts of equity are open to supply the defects, but not sap the fundamentals, of the law. Lastly, there presides over all one great court of appeal, which is the last resort in matters both of law and equity; and which will therefore take care to preserve an uniformity and *equilibrium* among all the inferior jurisdictions: a court composed of prelates selected for their piety, and of nobles advanced to that honour for their personal merit, or deriving both honour and merit from an illustrious train of ancestors: who are formed by their education, interested by their property, and bound upon their conscience and honour, to be skilled in the laws of their country. This is a faithful sketch of the English juridical constitution, as designed by the masterly hands of our forefathers, of which the great original lines are still strong and visible; and, if any of its minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigour: and that not so much by fanciful alterations and wild experiments (so frequent in this fertile age), as by closely adhering to the wisdom of the ancient plan, concerted by Alfred, and perfected by Edward I,

and by attending to the spirit, without neglecting the forms, of their excellent and venerable institutions.*

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* The courts of the United States consist of the following:

1. The senate as a court of impeachment.
2. The supreme court.
3. The circuit courts.
4. The district courts.
5. The court of claims.
6. The supreme court of the District of Columbia.
7. The territorial courts.

The court of impeachment derives its authority from article 1, section 3 of the constitution, and is sufficiently spoken of elsewhere. The judicial power generally is conferred by article 3, section 2.

The supreme court has original jurisdiction of all cases affecting ambassadors, other public ministers and consuls, and of those to which a state shall be a party. It also has appellate jurisdiction from the circuit court in civil cases, where the matter in dispute exceeds $2,000, and from the highest state court of each state, in any case where has been drawn in question the validity of a treaty, or of a statute of, or an authority exercised under, the United States, and the decision of the state court has been against its validity; also where has been drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the constitution, laws or treaties of the United States, and the decision of the state court has been in favor of such state law or authority; also where the decision of the state court has been against a right claimed under any clause of the constitution of the United States, or under any treaty or statute of or commission held under the United States; it has also appellate jurisdiction from the territorial courts where the amount in dispute exceeds $1,000, except from Washington territory, where it must exceed $2,000; and from the supreme court of the District of Columbia and from the court of claims, where the amount in

controversy exceeds $3,000; and in any other case where the judgment or decree may affect a constitutional question or furnish a precedent for a class of cases, the United States may appeal without regard to the amount in controversy.

The United States circuit courts have original jurisdiction, concurrently with the state courts, of all civil suits, at common law or in equity, where the matter in dispute exceeds $500, and the United States is a plaintiff, or an alien is a party, or where the suit is between a citizen of the state in which it is brought and a citizen of another state. They have exclusive jurisdiction of all crimes and offences cognizable under the authority of the United States, except where specially otherwise provided; and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. Under the patent laws they have jurisdiction in equity to restrain infringements. They have also appellate jurisdiction from the district courts where the matter in dispute exceeds $50.

The district courts have jurisdiction exclusively of the state courts, and concurrently with the circuit courts, of all crimes and offences cognizable under the authority of the United States, committed within their several districts or upon the high seas, where the punishment is not capital. They have also exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including seizures under the laws of impost, navigation or trade of the United States; and of all seizures on land or water under the laws of the United States, and of all suits for penalties and forfeitures incurred under those laws. They have also jurisdiction concurrently with the state courts and the circuit courts, of all cases where an alien sues for a tort, done, in violation of the law of nations or of a treaty of the United States; also of all suits at common law where the United States or any officer thereof, under the authority of an act of congress, may sue; also exclusive of the state courts of all suits against consuls or vice-consuls except for capital offences. These courts also have jurisdiction in bankruptcy cases.

The territorial courts possess such powers as are specially conferred upon them by the acts providing for their creation.

The supreme court of the District of Columbia is a court of general jurisdiction in law and equity; any one of its judges may hold a district court with the powers of the other district courts; and may also hold a criminal court for the trial of all crimes and offences arising within the district. From the special terms held by one judge appeals may be taken to the general term held by all or a quorum of all.

The court of claims has authority to hear and determine all claims founded upon any law of congress or regulation of the executive department, or upon any contract, express or implied, with the government of the United States, and all claims which may be referred to it by congress; also all set-offs, counter-claims, claims for damages, liquidated or unliquidated, or other demands whatsoever on the part of the government, against any person making claim against the government in said court.

The supreme court consists of one chief justice and eight associate justices. appointed by the president, by and with the advice and consent of the senate, during good behavior.

There are nine judicial circuits, for each of which a circuit judge is appointed in like manner and with the like tenure. The circuit courts are held by one justice of the supreme court and the circuit judge, or by the latter and the district judge, or may be held by any one of the three sitting alone. Where two sit together and disagree in opinion, the point of disagreement is certified to the supreme court for its decision.

There is one district court for each state, and in some states, two or more. Each district has a district judge appointed in the same manner and for the same term as the justices of the supreme court. The supreme court of the District of Columbia consists of four justices, and the court of claims of five, with the like tenure. The territorial judges hold their offices only during the pleasure of the president.—Note to Cooley's Blackstone.

QUESTIONS FOR STUDENTS

(The questions are numbered to correspond with the sections in this book; the answers may be obtained by referring to the corresponding sections.)

CHAPTER I.

1. Mention the leading difficulties encountered by the law student.

2. How is the chief obstacle to the study of law removed by the Cyclopedia of Law? What was the purpose of Blackstone's Commentaries? (See Preface.) What has been said as to the merit of such a system?

3. Was there any system for the study of law prior to 1765? Is the law more voluminous now than in Blackstone's time?

4. When were Blackstone's lectures first published? What American authors have written commentaries on the law? Why should the student be directed in his studies?

5. What important assistance does the law student require?

6. Why is a knowledge of the law necessary to others than lawyers? Give the special reasons why an American citizen should be familiar with the laws of his country.

7. Is a knowledge of the law regarded as an accomplishment? State its practical benefits.

8. What may be said as to the law student's previous education? What requirement is mentioned by Blackstone? Is a knowledge of other languages important? What has been the language of the English law? What, in general, is a sufficient preparation for the study of law?

9. How may the time necessary to acquire a knowledge of the law be greatly reduced?

10. Should all other work and study be laid aside to master law? Have persons studied law while following their usual avocations? What was Franklin's definition of leisure? How much leisure time have you, and how do you employ it?

11. What may be said of the cost of a legal education? How may it be reduced to a minimum?

12. What may be said as to the proper age at which to begin the study of law?

13. Should women study law? Give reasons for your answer.

14. Is not your occupation such that you could study the Cyclopedia of Law with advantage?

15. Are you desirous of attaining a higher intellectual and social plane? Will not a knowledge of the law assist you?

16. Have you not friends and acquaintances who would gladly join with you in establishing a local club for the purpose of studying law?

CHAPTER II.

17. Give Blackstone's definition of law; Holland's.

18. Give fully the analysis of Blackstone's definition. What are the several parts of a law?

19. In what more comprehensive sense is the word law used? By what reasoning does Blackstone find a higher sanction for law than the state?

20. What other view of the origin of law can you give? How is the word law as used in the theoretical sciences distinguished from its use in the practical sciences? What is Ethic? Nomology? Give the divisions of Nomology. Which of the Nomological sciences is the jurist's concern?

21. What class of laws are we to consider? Explain what is meant by the "law of nature." Why are laws of indeterminate authority excluded by the jurist?

22. What influence has the law of nature on the positive law? What is International Law? Explain what is meant by mala in se, and mala prohibitum.

23. Why is political organization necessary to law?

24. What may be said as to the development of the law? How does a law differ from a moral rule? How would we go about to ascertain what the law is on a particular subject? What may be said as to changes in laws?

25. Explain the origin of political societies.

26. What is meant by a people?

27. Define a state. What two parts in a state? Define each.

28. Discuss the origin of states. What is Blackstone's opinion of the original contract of society?

29. Define government. What are the divisions of government in regard to the residence of sovereignty? Define Monarchy; Aristocracy; Democracy.

30. Define a republican government. Why is a republican government said to be a mixed government? What advantages did Blackstone claim for the English system of government? Are these advantages found in our system? After which government is ours modeled?

31. What is the best form of government? Discuss fully. What may be said as to the spread of democracy?

32. What is meant by sources of the law? Explain how custom may be said to be a source of law; religion; adjudication; science; equity.

33. What is meant by legislation? What is the result of legislation? Into what general classes are laws divided?

34. Of what does the written law of the United States consist? What is meant by a constitution? Explain the difference between the Federal Constitution and State Constitution. Define a treaty. What is meant by statutes? Into what two general classes are statutes divided? Define each.

35. Discuss the unwritten law. Of what does it consist?

36. Discuss the common law in regard to its origin and development. What is a precedent? What is

meant by the doctrine of stare decisis? Is there a common law of the United States as a nation? Of the States?

37. What is meant by equity or chancery law? Of what does it consist?

38. What are the depositories of the written law? Of the unwritten law? What is meant by reports?

39. What is meant by codification of laws? Why was codification necessary and practical in the United States? What is meant by a code State? What was the purpose and object of codification? When and by which State was the first code adopted? Does the statutory code supersede within its scope all other laws? Is a knowledge of common law yet necessary to the student in the code States? What does Judge Cooley say as to the value of the common law rules of pleading?

40. What may be said as to separating the law into separate branches? In what way is such a division helpful?

41. Define public international law.

42. Define and discuss private international law.

43. Define a constitution. How do you account for dual constitutions in the United States?

44. Discuss laws pertaining to persons. What branches or subjects fall under this division?

45. Into what two general classes is property divided? What subjects are considered under property law?

46. What name is given to the law regulating crimes or public wrongs?

47. What is meant by substantive law? By adjective

law or procedure? What subjects come under the head of procedure?

48. What is meant by legal ethics?

49. By what signs may the will of the legislature be interpreted? How are words to be generally understood? What is meant by the context? Subject matter? Effects and conquences? What branch of law arises from interpreting a law according to its reason and spirit?

50. Where does sovereignty reside in the United States? Is the law influenced by popular sentiment? Discuss fully. What influence has the lawyer had upon political liberty in America? What further service can the lawyer render to his country?

QUESTIONS FOR STUDENTS

ON

SELECTED CHAPTERS FROM BLACKSTONE'S COMMENTARIES. NATURE OF LAWS.

(From Introduction to Vol. I., Blackstone.)

SECTION II.

Of the Nature of Laws in General.

Define and explain *law* as a rule of action prescribed by a superior power.

Define and explain what is meant by *natural law.*

What is meant by *divine* or revealed law? Explain its connection with human laws.

What is meant by the *law of nations?* What is the usefulness of this law or laws?

Give Blackstone's definition of *municipal law* in his words.

Why should the rule prescribed be for the future? What is the purpose of society? What is the purpose of government? Name and define the three forms of government.

To whom does the right of legislation belong in organized governments? Where is it placed in England? What may be said as to the balance of power under the

English system of government? Compare the English and American systems.

Give the constituent parts of a law, and define and explain each, that is, the *declaratory, directory, remedial* and *vindicatory.*

Are natural rights and duties strengthened by human laws? Why?

Are things *malum in se* made worse by human legislation? Why? Give and explain the distinction between *malum prohibitum* and *malum in se.*

What is the nature of the sanction of human laws? Why? What laws are binding on the conscience, and which are not? Is Blackstone's reasoning correct in this matter?

Who should interpret the laws? What is the chief end in interpretation? How is this done, explain fully by giving the five principles of interpretation laid down by Blackstone. From what does *Equity* arise? Define *Equity.* Why is it harder to establish rules for equity?

SECTION III.

(Introduction to Blackstone's Commentaries.)

Of the Laws of England.

What is the first general division of laws by Blackstone? What is the origin of the unwritten or common law? What does it include? Explain fully, general customs, particular customs, particular laws.

What is embraced in American common law?

How is the common law determined? And how is the evidence of what it is preserved? What are precedents, and why should they be followed? When may precedents be overruled? How are legal precedents preserved? What is meant by a digest?

What is meant by particular customs? Give the seven principles or rules controlling particular customs as laws.

How are customs to be construed? Must they submit to the King's prerogative? Why?

What is meant by particular laws? What do they include? Explain fully, and give the courts which receive and are guided by these particular laws. What is the Roman or civil law? The canon law?

What does the written law include?

What division does Blackstone make of statutes? Define and explain each of these divisions. Why are general or public statutes taken judicial notice of? What may be said of special or private acts?

What are declaratory statutes? What is the purpose of remedial statutes?

Give the ten rules of construction laid down by Blackstone in full, explaining each fully.

What may be said as to the purpose of equity.

BOOK I.

(Blackstone's Commentaries).

OF THE RIGHTS OF PERSONS.

CHAPTER I.

Of the Absolute Rights of Individuals.

What are the two main objects of the laws of a country as laid down by Blackstone?

How are rights classified?

How are wrongs classified?

What classification of persons may be made? Explain and define each class.

What classification of the rights of persons does the author make? Explain each fully.

What class of these belong to persons in a state of nature? Why? What general name is given to them? Define and explain what is meant by *political* or *civil* liberty.

Name and explain the absolute rights of Englishmen declared by statutes.

When does life begin in contemplation of law?

What are the limbs in law?

What is meant by duress? Why are acts done under duress void?

When is a person said to be civilly dead?

For what may life be forfeited? How?

What is meant by personal liberty?

Explain fully what is meant by *law of the land,* and *due course of law.*

How is the law of the land preserved?

When may the writ of *habeas corpus* be suspended? What is meant by imprisonment?

What may be said as to punishment by exile?

Who may be sent out of the kingdom by the sovereign?

In what does the right of private property consist? Explain fully.

To what is the right of property in the individual subject? Why? What must the government do on taking the individual's property? What other claim has the government on the individual's property? What limitations on this claim in America?

Name and explain fully the modes or methods of securing these rights or redressing their violation as laid down by Blackstone. Give the five modes stated by Blackstone. Give the methods of securing these rights in America.

BOOK I. CHAPTER X.

(Blackstone's Commentaries.)

Of the People, Whether Aliens, Denizens or Natives.

Explain fully what is meant by a natural born subject.

Who are aliens?

What is meant by allegiance? What does the citizen get in return for his allegiance?

What may be said of allegiance in natives? Why?

What may be said of allegiance in aliens?

Explain the nature of the rights of natives. Of aliens.

What may be said of the rights of aliens to purchase, hold and dispose of property? What is the law in U. S. as to this?

Are the children of English subjects born abroad considered as natural born subjects? Why?

Are the children of aliens born in England considered as natives? Why?

How may aliens become denizens?

What is meant by naturalization? How is it accomplished?

What are the rights of naturalized citizens?

What may be said of the disabilities affecting the Jews in England in former times? Can you state the laws in the U. S. in this regard?

BOOK I. CHAPTER XII.

(Blackstone's Commentaries.)

Of the Civil State.

Into what three classes or states does Blackstone divide the laity of England?

What is included in the *civil?* What is meant by the nobility? By the commonalty? Are there any such divisions in America? Which do you think the best system?

What are the classes or ranks of the nobility in England as given by Blackstone?

How is the nobility created? How tried for crimes? Can they be arrested in civil cases? Why? Are they sworn when they give evidence? Do you think they have more honor than the commonalty?

How can a noble lose his patent of nobility?

Of what does the commonalty consist? Can you give the table of precedence? Where is the laborer in this table?

BOOK II.

(Blackstone's Commentaries.)

OF THE RIGHTS OF THINGS.

CHAPTER I.

Of Property in General.

From whom is the dominion over external things derived?

What does Blackstone say as to the primary right of all to the land of the earth?

How does he explain the acquisition of property by individuals?

How were temporary rights in permanent things first acquired?

What further claim did the occupant later make to the substance? To what is this claim referred by right?

On what is colonization based?

How is the right to dominion over land lost?

Why did society establish wills, conveyances, etc?

When other inheritance fails, who succeeds to the property?

What things are still considered common to all? Why?

What rights do individuals have in things which are common to all? What is meant by usufructuary property?

In whom is the title to other things not owned by any one vested?

What can you say as to the validity of individual claims to land and property as against the claims of society as a whole?

CHAPTER II.

Of Real Property; and First of Corporeal Hereditaments.

Of what do things real consist, according to Blackstone?

Define and explain what is meant by *land.*

What does *tenement* signify?

What is meant by *hereditaments?*

Define and explain what is meant by corporeal hereditaments. What does the land usually include, and how far up and down is it supposed to extend?

CHAPTER III.

Of Incorporeal Hereditaments.

Define and explain what is meant by an incorporeal hereditament.

Name the kinds of incorporeal hereditaments given by Blackstone.

What is meant by a right of *common?*

Name and explain the four varieties of common stated by Blackstone.

What is meant by *ways?* How distinguished from highways? How are highways established?

What is meant by a way being *in gross* or *appurtenant* to an estate?

How do *ways* originate? Explain fully each way. When may a way of necessity come to exist?

What is meant by *offices?*

Explain what is meant by *dignities.*

What may be said of *franchises?* From whom are they derived in England.

What is meant by *corodies?*

What is the meaning of *annuities?*

What are rents?

Give and explain each of the three classes of rents enumerated by Blackstone. From what do rents accrue?

CHAPTER IV.

Of the Feudal System.

(Omitted.)

CHAPTER V.

Of the Ancient English Tenures.

How was all real property anciently holden in England? Why?

What made the distinction in tenures?

Name the different classes of tenures which came to prevail, and state which were considered the most honorable. What were the incidents to these tenures? Define and explain these incidents.

How did grand serjeanty differ from chivalry?

State how the personal services given in return for land came to be paid in money. What were these payments called?

When were the military tenures abolished? Which of these were excepted?

CHAPTER VI.

Of the Modern English Tenures.

What is meant by socage tenure? What kind of socage tenures were there? Define and explain each.

What had these tenures to do with Saxon liberty?

What variety of socage tenures were there, and what relation did they bear in England to the feudal tenures?

Explain fully the similarity between socage tenures and feudal, or chivalry tenures.

What kinds of villenage tenures were there? Define and explain each. What sort of tenures sprung from villenage?

Explain fully the origin and nature of a manor in early England, and the connection of copyhold tenures therewith.

What were the various sorts of villeins? How did they become enfranchised?

Upon what does copyhold tenures rest? What are their indicia, as regards, inheritance, service, escheats, heriots, wardships and fines?

What is meant by privileged villenage? What are the incidents of this sort of holding? Where did it exist?

What was it called? How did the tenants in this sort hold?

What was meant by frankalmoign tenure? What were the incidents of it? How did it differ from tenure by divine service?

CHAPTER VII.

Of Freehold Estates of Inheritance.

Define and explain what is meant by an estate in lands.

What three things are to be considered in ascertaining an estate in lands? Discuss fully each of these things or incidents.

How are estates classified with respect to quantity of interest?

Define and explain fully what is meant by a freehold estate.

What is meant by livery of seizin? Explain fully.

What classes of freehold estates as to descent?

How are freehold estates of inheritance divided? Explain each fully.

Define and explain what is meant by a tenant in fee-simple. What degree of property may this be said to be? Why?

In whom does the fee-simple reside? May lesser estates be carved out of a fee-simple?

What word or words are necessary to create a fee? What are the exceptions to this rule?

Define and explain fully what is meant by a base or qualified fee.

What is meant by a conditional fee at common law? Explain fully the conditions and incidents of this sort of estates.

When and how could the donee alien such an estate?

What was the purpose and object of the statute *de donis?* Under the statute *de donis* whom did such estates go to if there were no issue?

What was a conditional fee then called? What sort of tenements may be entailed?

Explain and define what is meant by estates tail, *general* and *special.*

Give the words that are necessary to create a fee tail.

What sort of a holding is frank marriage?

What are the incidents to estates tail as given by Blackstone? Explain and describe each of these.

What is the historical significance of estates tail? In Blackstone's time and later did these estates exist? Can you state how the American law regards estates tail, and how they may be aliened thereunder?

CHAPTER VIII.

Of Freeholds Not of Inheritance.

How are freeholds not of inheritance classified?

How are conventional estates for life divided? How may they be created? What are the incidents to these estates?

What is meant by estovers? By emblements? Are sub-tenants entitled to these?

How are legal freeholds not of inheritance classified?

What is meant by tenancy in tail after possibility of issue extinct? Explain fully.

Define and explain fully the meaning of tenancy by the courtesy of England, and the requisites thereof.

Define tenancy in dower. Explain fully the requisites of a dower estate? What portion of the whole estate was common law dower? What were the incidents necessary to the establishment of a dower estate?

What other sorts of dower were there other than by common law? Define and explain these.

When is the dower estate complete.

How may the estate of dower be barred?

How is dower regulated in the United States?

CHAPTER IX.

Of Estates Less than Freehold.

Name and define these estates that are less than freehold.

Explain the incidents and characteristics of estates for years.

Explain fully the incidents and characteristics of estates at will.

What are the rights of the parties when an estate at will is determined?

How are copyhold estates distinguished from estates at will?

What are the incidents of estates at sufferance? How is such an estate created?

CHAPTER X.

Of Estates Upon Condition.

How are estates upon condition created? Define them in Blackstone's language.

How are they to be classified? How are estates upon condition expressed divided?

Define and explain estates upon condition implied.

Define and explain estates upon condition expressed. Give Blackstone's language.

How does a limitation differ from a condition?

What sorts of conditions are void?

Define and explain estates in pledge. How are they classified? Define and explain each class.

What are the two parts of a mortgage? May they both be in the same instrument, or separate instruments?

May a power of sale be added to a mortgage? How?

When and how may the mortgagee take possession of the mortgaged premises? How may his possession be terminated?

What is meant by the equity of redemption? Explain fully.

How may the equity of redemption be cut off or foreclosed? Explain fully each method.

When may the vendor of land have an equitable mortgage? Must this be in writing? Why?

What is meant by estate by statute merchant or statute staple?

What do you understand by an estate by elegit?

CHAPTER XI.

Of Estates in Possession, Remainder and Reversion.

How are estates classified as regards the possession?

How are estates in expectancy divided?

Define an estate in possession. An estate in expectancy.

Define a remainder. What are the incidents or requisites to such an estate? Define and explain each of these fully.

How are remainders classified?

Define a vested remainder.

Define a contingent remainder.

Upon what may a contingent remainder or freehold be limited? Why?

How are contingent remainders defeated? Why?

Define and explain an executory devise. Does it require a particular estate? Why? What are other characteristics of an executory devise? Explain fully.

What may be said as to the length of time the power of alienation may be suspended? Why?

Define a reversion. What are the main incidents to a reversionary estate? Explain fully.

When a greater and lesser estate meet in the same person, what happens? Why? How must they meet that a merger takes place? Explain fully.

CHAPTER XII.

Of Estates in Severalty, Joint Tenancy, Coparcenary, and Common.

Define and explain an estate in severalty.

Define and explain an estate in joint tenancy.

Mention and explain each of the various requisites of an estate in joint tenancy. How are the tenants seized?

What may be said of an estate granted to a husband and wife jointly?

On the death of a joint tenant, to whom does the estate go? Why?

How may an estate in joint tenancy be destroyed?

Define and explain an estate in coparcenary. How are each of the coparceners seized?

May the parceners have partition? What is meant by partition? How is it effected?

What is meant by hotch-pot which is incident to coparcenary estates? What is meant by tenancy in common?

How may a tenancy in common be created? How do the tenants take? Is there survivorship?

How may tenants in common sever their interests?

CHAPTER XIII.

Of the Title to Things Real in General.

Explain fully what is meant by title, giving Blackstone's definition verbatim.

What is the lowest form of title? Explain fully.

What is the next step in title acquisition?

When may the right of property exist without possession or right of possession? Give examples.

What is necessary to a complete and perfect title?